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No. 11117

2416

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CLIFFORD J. JUDD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,

Southern Division

FILED

JAN 21 1946

PAUL P. O'BRIEN,  
CLERK





No. 11117

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CLIFFORD J. JUDD,

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Transcript of Record

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Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 29407-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD J. JUDD and FRANK EDWIN  
SHELEY,

Defendants.

### INFORMATION

(Title 18 USCA Section 241.)

Now comes Frank J. Hennessy, United States Attorney for the Northern District of California, and by leave of Court first had obtained, informs this Court; That Clifford J. Judd and Frank Edwin Sheley (hereinafter called "said defendants"), on or about the 19th day of April, 1945, at the City and County of San Francisco, State of California, within said Division and District, did knowingly, wilfully and unlawfully, by threats and by force, endeavor to influence, intimidate and impede one Lester Dale Haliman, the said Lester Dale Haliman being a witness in the United States District Court for the District of Nevada in the case of the United States vs. Clifford J. Judd and William N. Beatty, a proceeding before the said District Court for the

District of Nevada, as the said defendants then and there [\*1] well knew.

FRANK J. HENNESSY

United States Attorney

United States of America,  
State and Northern District of California,  
City and County of San Francisco—ss.

W. G. Whitfield, being first duly sworn on oath, says: That I am an Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department; I have read the foregoing Information and the facts therein are true of my own knowledge.

W. G. WHITFIELD

Subscribed and sworn to before me this 30th day of April, 1945.

[Seal] C. M. TAYLOR

Deputy Clerk, U. S. District Court, Northern District of California

[Endorsed]: Presented in Open Court and Ordered. Filed May 1, 1945. [2]

District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 1st day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,  
District Judge.

No. 29407-G

UNITED STATES OF AMERICA,

vs.

CLIFFORD J. JUDD.

ARRAIGNMENT AND PLEA OF "NOT  
GUILTY" BY DEFENDANT

In this case the defendant, Clifford J. Judd, was present in proper person and with his attorney, Fred McDonald, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Colvin, the defendant was called for arraignment. The defendant was informed of the filing of the Information by the United States Attorney, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said



defendant was informed of the charge against him and stated that he understood the same. Mr. McDonald waived the reading of the Information.

The defendant was called to plead and thereupon said defendant pleaded "Not Guilty" to the Information filed herein against him, which said plea was ordered entered.

After hearing the attorneys, it is ordered that this case be continued to June 6, 1945, for trial. (Jury) [3]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division

No. 29407

THE UNITED STATES OF AMERICA

vs.

CLIFFORD J. JUDD and FRANK EDWIN  
SHELEY

VERDICT

We, the Jury, find as to the defendants at the bar as follows: Clifford J. Judd, Guilty; Frank Edwin Sheley, Not Guilty.

KIRBY B. CRITTENDEN  
Foreman

[Endorsed]: Filed June 8, 1945. [4]

District Court of the United States, Northern District of California, Southern Division

No. 29407-G

UNITED STATES

vs.

CLIFFORD J. JUDD.

Criminal Information in one count for violation of Title 18 USCA Section 241.

On this 8th day of June, 1945, came the United States Attorney, and the defendant Clifford J. Judd appearing in proper person, and by counsel, and,

#### JUDGMENT AND COMMITMENT

The defendant having been convicted on verdict of guilty of the offense charged in the Information in the above-entitled cause, to wit: Viol. Title 18 USCA Section 241. Defendant did, on April 19, 1945, in San Francisco, California, unlawfully endeavor to influence a certain individual, said individual being a witness in the United States District Court for the District of Nevada, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for the period of six (6) months, and pay a fine to the United States of America in the sum of Five Hundred (500.00) Dollars.

Entered in Vol 36 Judg and Decrees at page 128.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) LOUIS E. GOODMAN

United States District Judge

Examined by:

REYNOLD H. COLVIN

Assistant U. S. Attorney

The Court recommends commitment to a County Jail.

Filed and Entered this 8th day of June, 1945.

(Signed) C. W. CALBREATH

Clerk

(By) L. R. ELKINGTON

Deputy Clerk

Entered in Vol. 36 Judg. and Decrees at Page 128. [5]



[Title of Court and Cause.]

### NOTICE OF APPEAL

Name and Address of Appellant: Clifford J. Judd, 529 Mill Street, Reno, Nevada.

Name and Address of Appellant's Attorney: Fred McDonald, 935 Mills Building, San Francisco, California.

Offense: Violation of Section 241, Title 18, United States Code Annotated.

That Clifford J. Judd and Frank Edwin Sheley did, on or about the 19th day of April, 1945, at the City and County of San Francisco, State of California, knowingly, willfully and unlawfully, by force and threats, endeavor to intimidate and impede one Lester Dale Haliman, the said Lester Dale Haliman being a witness in the United States District Court for the District of Nevada in the case of the United States vs. Clifford J. Judd and William N. Beatty, a proceeding before said United States District Court for the District of Nevada, as the said defendants then and there well knew.

Judgment Date: June 8, 1945.

Description of Judgment and Sentence: "Guilty." Sentence: Six months in the County Jail and to pay a fine of \$500.00.

Name of prison where now confined: County Jail of the City and County of San Francisco.

I, the above named appellant, do hereby appeal to the United States Circuit Court of the Ninth

Circuit from the judgment above described upon the grounds set forth below: [6]

## GROUND OF APPEAL

### I

That the learned trial judge committed errors in law arising during the course of the trial and erred in decisions on questions of law arising during the course of the trial.

### II

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

### III

That the court erred in not granting the motion of the defendant for a new trial.

### IV

That the court erred in not granting the motion of the defendant for arrest of judgment.

\* Dated: June 9, 1945.

CLIFFORD J. JUDD

Appellant

FRED McDONALD

Attorney for Appellant

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed June 9, 1945. [7]

In the United States District Court for the Northern District of California, Southern Division

No. 29407-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD J. JUDD and FRANK EDWIN  
SHELEY,

Defendants.

### ASSIGNMENT OF ERRORS

Now comes the defendant Clifford J. Judd, in the above entitled action who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore made, entered and given against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California, and files this, his Assignment of Errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

#### I

That the Court erred in admitting in evidence over the defendant's objection the certified copy of indictment and the record of the cause in action No. 11171, United States of America, plaintiff vs. Clifford J. Judd, et al, pending in the United States District Court for the District of Nevada. [8]



## II

That the Court erred in admitting in evidence over the objection of said defendant the testimony of the witness Dale Haliman concerning a conversation, taking place on April 4, 1945, in the Streets of Paris Cafe in the City and County of San Francisco.

## III

That the Court erred in admitting in evidence testimony as to conversations taking place in Reno, Nevada, on or about the 27th day of March, 1945.

## IV

That the Court erred in refusing to strike from the record all of the testimony of the witness Mrs. Bonita Yaggie.

## V

That the Court erred in overruling the objection of the defendant to testimony of the witness Mrs. Marie V. Cole as to testimony concerning threats made to said witness.

Wherefore said defendant, Clifford J. Judd prays that the judgment of said District Court be re-

versed and that said information against him be quashed and that he may go hence without delay.

FRED McDONALD

JOSEPH P. LACEY

HARMAN D. SKILLEN

Attorneys for said Defendant

Receipt of copy of the above Assignment of Errors admitted this 31st day of July, 1945.

FRANK J. HENNESSY

United States Attorney

By REYNOLD H. COLVIN

Assistant to United States  
Attorney

[Endorsed]: Filed Aug. 25, 1945. [9]

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[Title of District Court and Cause.]

### PROPOSED BILL OF EXCEPTIONS

Be It Remembered that the above entitled cause came on regularly for trial before the Court, with a jury, Reynold H. Colvin, Esq., appearing for the United States of America and Fred McDonald, Esq., appearing as counsel for the defendants Clifford J. Judd and Frank Edwin Sheley, Honorable Louis E. Goodman, Judge of said court, presiding. Thereupon the following proceedings were taken and had:

The United States Attorney made an opening statement of the matters and things he expected to

prove. Counsel for the defendants reserved his right to make an opening statement at the conclusion of the government's case. Thereafter the following proceedings took place:

Mr. Colvin: May it please the Court at this time the government will offer in evidence certain documents to-wit, certified copy of an indictment, in case No. 11171 in the District Court of the United States of America in and for the District of Nevada, United States of America, plaintiff, vs. William Nelson [10] Beatty, Jr., and Clifford J. Judd; and a copy of the docket entries in that case No. 11171. I call the Court's attention at this time to the fact that there are stapled together.

Mr. McDonald: Of course, if your Honor please, I think, your Honor, Mr. Colvin should not make any statement of what is stapled together.

Mr. Colvin: Other papers—we make the limited offer to that No. 11171.

Mr. McDonald: To which we object as incompetent, irrelevant and immaterial. The proper foundation has not been laid. It has not been shown that this defendant is the defendant mentioned in the papers that Mr. Colvin has in his hand. We have the further objection that these papers are not the best evidence, that there is no showing why the original records of the Court have not been brought here. We submit the objection on those grounds.

The Court: You are only offering the papers in case No. 11170?

Mr. Colvin: No, 11171, your Honor.

The Court: You are not offering the papers in 11170?

Mr. Colvin: I am not offering those.

The Court: So I can understand, you are only offering the papers in the case where the two defendants are named?

Mr. Colvin: That's right.

The Court: And not in the case where there is one defendant?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and I will note an exception for you. You better read them to the jury and separate them.

#### EXCEPTION NO. 1

Mr. Colvin: I want to point out, however, so far as the certification is concerned that can be separated.

The Court: The certification as to both sets of documents?

Mr. McDonald: If your Honor overrules my objection we can [11] dispense with the certification as far as the jury is concerned, although having it before the Court subject to the reservation of the objection heretofore made.

The Court: The documents may be treated as certified without showing the certification to the jury, and you may detach the papers you wish to present.

Mr. Colvin: We want the indictment in No. 11171 and the docket entries in 11171 of the District Court of Nevada.



(The indictment in case No. 11171 in the United States District Court for the District of Nevada marked "U. S. Exhibit No. 1"; docket entries in the same case marked "U. S. Exhibit No. 2").

Mr. Colvin: May it please the Court, I should like the Court's permission at this time to read government's Exhibit No. 1 to the jury, simply because their understanding of the indictment.

The Court: It is in evidence. You may read it if you wish.

Then Mr. Colvin read government's Exhibit No. 1 to the jury as follows:

"Filed April 16th, 1945. O. E. Benham, Clerk.  
By J. P. Fodrin, Deputy.

MILES N. PIKE

United States Attorney

"In the District Court of the United States of  
America, in and for the District of Nevada

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM NELSON BEATTY, JR., and CLIF-  
FORD J. JUDD,

INDICTMENT FOR VIOLATION

Sec. 88, T. 18, U.S.C.

United States of America,  
District of Nevada—ss. [12]

"Of the February, 1945, Term of the District

Court of the United States of America, in and for the District of Nevada;

“The grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

“That William Nelson Beatty, Jr., and Clifford J. Judd, defendants named above, whose other or true names are to these Grand Jurors unknown, on or about March 15, 1945, and during all the times hereinafter mentioned, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly and feloniously, combine, conspire, confederate and agree together and with each other, to commit offenses against the United States by means and in the manner following, that is to say:

“That at all times herein mentioned, defendant Clifford J. Judd, should keep and maintain at the Depot Bar on Commercial Row in Reno, Nevada, a quantity and supply of intoxicating liquors, to-wit: whiskey; that said Clifford J. Judd should, from time to time, sell, or consign, and deliver quantities of such intoxicating liquor to defendant, William Nelson Beatty, Jr., for transportation from Reno, Nevada, to Salt Lake City, Utah, with the intention in each of said defendants, then and there, that said liquor should be sold and used in the State of Utah in violation of the laws of the State of Utah; that defendant, William Nelson Beatty, Jr., should

receive delivery of said liquor from Clifford J. Judd, and should transport it from Reno, Nevada, to Salt Lake City, Utah, for sale and use in the State of Utah, in violation of the laws of said State; that the liquor so sold or consigned and delivered by Clifford J. Judd to William Nelson Beatty, Jr., and received by the latter, should be sold and disposed of by William Nelson Beatty, Jr., to a person or persons [13] to these Grand Jurors unknown, at prices in excess of the ceiling prices fixed and established for such liquor under and pursuant to Emergency Price Control Act of 1942, as amended, and the Rules and Regulations promulgated pursuant thereto.

“And the Grand Jurors aforesaid, do further present and charge that said defendants having formed the conspiracy, confederation and agreement to execute and do the unlawful acts and things hereinabove set forth, and in pursuance of such unlawful and felonious conspiracy, confederation and agreement, and to effect the objects and purposes thereof, said defendants did commit and perform, among others, the following overt acts:

“(1) On or about March 15, 1945, said defendants, Clifford J. Judd and William Nelson Beatty, Jr., conferred together regarding the objects and purposes and execution of such conspiracy, at the Depot Bar in Reno, Nevada.

“(2) On or about March 16, 1945, defendant, William Nelson Beatty, Jr., purchased from the Matthews Motor Company, in Reno, Nevada, a 1940

Oldsmobile Sedan, for use in the transportation of the liquor.

“(3) On or about March 18, 1945, Clifford J. Judd and William Nelson Beatty, Jr., removed fourteen (14) cases of pints and four (4) cases of fifths, of Old Token Blended Whiskey, 86 proof, from the basement of the Depot Bar in Reno, Nevada, and loaded said whiskey into the said Oldsmobile Sedan automobile.

“(4) On or about March 18, 1945, William Nelson Beatty, Jr., drove said Oldsmobile Sedan automobile, containing said eighteen (18) cases of Old Token Whiskey, from Reno, Nevada, to Elko, Nevada, enroute to Salt Lake City, Utah.

“(5) On or about March 19, 1945, at Reno, Nevada, defendant, William Nelson Beatty, Jr., sent a telegraphic message by Western Union to defendant, Clifford J. Judd, as follows: “Blown head gasket at Stockmen’s Hotel leave tomorrow p. m.” [14]

“Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ MILES N. PIKE

United States Attorney

“A True Bill:

/s/ HARRY GRAY,

Foreman.”

(Transcript, p. 5, line 25, to p. 9, line 16)



LESTER DALE HALIMAN,

called as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

The Clerk: Q. Will you state your name to the Court and jury?           A. Lester Dale Haliman.

Direct Examination

By Mr. Colvin:

I was before the grand jury at Carson City, Nevada, on April 16, 1945. I testified before the grand jury. I have heard the reading of an indictment which is government's Exhibit No. 1 in this courtroom. I testified to the facts set forth in that indictment. I came back to Reno after testifying and took the train that night and returned to San Francisco the next day. I got in in the morning. I got in the morning of the 17th at approximately seven o'clock. I think it was the night of the [15] 19th, the first night I worked. I didn't work this side. On the 19th of April 1945 I was employed at the Below Decks at 1285 Market Street. My employment there was a service bartender. I believe I went to work at about five o'clock or a little before. I know Clifford Judd. He is sitting directly behind you in the courtroom. I will point him out to the Court and ladies and gentlemen of the jury. (The witness identified the defendant Judd). I know Frank Sheley. He is here in the courtroom. He is the gentleman over there with glasses. (The witness identified the defendant Sheley.) I saw both of them on

(Testimony of Lester Dale Haliman.)

the 19th of April 1945. I saw them at the Below Decks where I was employed. I would say that I saw them somewhere in the vicinity of eight or nine o'clock in the evening. I saw Judd first. The Below Decks is below the street level. If you are facing the building on the extreme left hand side is the entrance to the building. When you reach the bottom of the stairs there is a bar on the other side of the room. The bar would be across the room, and I imagine the room is twenty-five or thirty-five feet wide. Perhaps that, or more. I am not a very good judge of distance, perhaps more. I first saw Judd when he got to the bottom of the stairs. I do not know whether there was anyone with him. I did not see Sheley until a few minutes later. Judd reached the bottom of the stairs. He walked across the room toward me, smiled and said, "Helloe Dale," and I said, "Helloe Cliff." I then came back to the bar, and I noticed Sheley then. He was standing ten or fifteen feet away. That was the first time I saw Sheley. Judd said, "I heard you were exonerated," and I said, "Yes, that's right," and he said "Sheley was exonerated, too. He got a letter," and he said, "How did you know you were?", and I said, "I got a letter, too." He said, "What did the letter say?" and I said, "Well, just something to the effect that my bond had been liberated and I had been [16] exonerated." He said, "Have you seen Bill? and I said, "No," and he said, "Are you all through or will you be going back there to testify?" and he said, "If you are, you had better not", and he asked

(Testimony of Lester Dale Haliman.)

me again—. Perhaps I could show you the relative position of myself and Mr. Judd while this conversation took place. The service bar at the Below Decks, where I am employed, is at one end of the bar. I handle no service for the front bar patrons; just for our cocktail waitresses. I believe that night there were four working. It is hard to describe. Right directly in front of me like a space—so I took my station where the waitresses come for the drinks, and there is a rail coming down over the bar. This is on my left, and there are stools for the front bar. My mother was sitting in the corner by the rail with the stool closest to me. When Judd came up to the bar he came right beside her and when I was talking to him most of the time I was leaning over in that direction, and there is a cooler that projects on the inside of the bar that sticks out so far, (the witness indicating about three feet). I think that explains it pretty well. I gave you part of the conversation. The next thing that happened, he asked me to repeat how the letter was worded, and I said, “I don’t know exactly, just something to the effect that I had been exonerated and I had been liberated,” and with that,—do you want me to give you the exact words he said?

The Court: That is up to the United States attorney.

Mr. Colvin: I am asking you to state the conversation.

Witness: He said, “You are a damn liar,” and reached across the bar and struck me on the side



(Testimony of Lester Dale Haliman.)

of the head, and my mother was sitting there and said, "How dare you strike Dale?" He said, "Who the hell are you?" And she says, "I happen to be his mother." He said, "We want to see you outside" and left. I don't believe Sheley was within earshot during this conversation. He was [17] approximately ten feet away. The next thing that happened, Sheley came over and said that he and Judd had seen signed statements by Bill Beatty and I to the effect that Judd purchased the liquor from Sheley, and I denied that. He asked me where I could find Beatty and if I could tell him where he was. I told him I did not know. He told me I did know, and I was a liar. I said, "It doesn't make any difference whether I did or not, and if I did know I wouldn't tell you anyway." And he said, "Is that your answer?" And I said, "Yes." They said they were very anxious to find Beatty, and he said he wouldn't blame Judd for killing anyone that testified because he would do the same thing himself. There was more conversation. I don't remember it word for word, except Sheley said he was pretty mad about the case, that it cost him a lot of money, and he told me Judd wanted to be my friend, and he said that he was half crazy, that he was upset, and that he was facing the penitentiary, and that he believed that he had been drinking. That was all the conversation. He talked to my mother as well. I couldn't hear that; just a word once in a while. I had no further conversation with Judd. Judd had left. I was present at this conversation with my mother.



(Testimony of Lester Dale Haliman.)

This was a conversation between my mother and Sheley.

I had been arrested in connection with the case in Nevada. At the time I appeared before the grand jury I was under arrest in that case. I was not indicted. The earliest conversation I had with Mr. Judd regarding this case was April 3, 1945, in the Streets of Paris in San Francisco, where I was also employed. This took place, I think, about five o'clock in the evening. There was present besides myself and Judd, Miss Bonita Yaggie.

Mr. Colvin: Q. With reference to the case at Reno, Nevada, what conversation did you have with Mr. Judd?

Mr. McDonald: If your Honor please, I will object to this as incompetent, irrelevant, and immaterial, and further that it [18] goes to a transaction not laid in the indictment, and I can see that it has no place in this case. This is a case of a threat made upon April 19.

Mr. Colvin: May it please the court—

Mr. McDonald: Mr. Colvin is attempting to elicit a conversation that took place before there was any indictment returned in Nevada. The date he fixes is the return of the indictment, which is April 16, and this is on April 3rd.

Mr. Colvin: It is obviously an element of this case as to whether Mr. Judd had knowledge that Mr. Haliman would be called as a witness in this case at Reno, Nevada. The purpose of this conversation is to indicate that Mr. Judd had such knowledge.

(Testimony of Lester Dale Haliman.)

The Court: I will overrule the objection.

Mr. McDonald: Exception.

The Court: You may have an exception.

## EXCEPTION No. 2

Judd came into the bar and asked me if I had seen Bill Beatty, the defendant, and I told him I hadn't. He asked me when the case was coming up, if I knew, and I said I was about to be called before the grand jury on the 16th, but I wasn't sure of the date, and he talked over the case quite a bit. He told me he wasn't going to ride the beef on the liquor and destroying the serial numbers. He said he would have to say we stopped somewhere along the road and destroyed them ourselves. He admitted that he destroyed them. He told me that he was going to have our bonds raised and that the bondsman was a friend of his, and he didn't care if he raised his along with ours, that he had plenty of money. I understood that we would have to stay in jail unless we could raise money to meet our bonds. He also told me he was going to have me picked up for the El Cortez robbery in Reno. I told him that was silly because I could [19] prove where I was that night, and he said he didn't know about that, that I will be picked up, and that he had known that, and he told me if I testified against him I would be dragged into the case, too, and that is about the text of it. He got up and left. This conversation lasted about fifteen minutes at the most. I cannot think of any-

(Testimony of Lester Dale Haliman.)

thing I haven't told you. There was a conversation before this in reference to this case. I believe it was on the 27th of March. It took place in Nevada. I had two conversations with him. They were both on the same day, on the 27th of March. One took place in the Waldorf. It is a restaurant and bar in Reno. I think it was late in the afternoon at about approximately four o'clock. There were a number of people present, but I don't think anyone was within ear-shot. No one else was a party to the conversation.

Mr. Colvin: Q. What was the conversation as it related to the Nevada case?

Mr. McDonald: We object to that as incompetent, irrelevant and immaterial, as a transaction not laid within the issued of this indictment. It is remote and far afield, and incompetent, irrelevant, and immaterial.

The Court: Is this offered for the same purpose as the other?

Mr. Colvin: Yes, your Honor.

Mr. McDonald: May I state, the other conversation, your Honor, was offered to show, and I presume limited to that purpose, to show that Mr. Judd knew this defendant was a witness. I listened very attentively to the conversation and while it contained a number of prejudiced remarks supposed to have been made by Mr. Judd, I don't see yet where it showed that this man was going to be a witness.

The Court: I think the objection goes to the weight of that testimony. I don't know whether



(Testimony of Lester Dale Haliman.)

you are making now a fur- [20] ther objection to that testimony, or to the proposed testimony.

Mr. McDonald: I ask that be stricken, and I am objecting to this testimony.

The Court: I will deny your motion and you may have an exception. For the same purpose this conversation now about to be stated by the witness will be admitted, and an exception will be noted.

Mr. Colvin: The government is offering these conversations to show that the defendant Judd had knowledge that Mr. Haliman would be a witness in this transaction, and that there was such a case pending at that time, and would be pending. The conversation will relate to those matters.

### EXCEPTION No. 3

He asked me what Bill had told him, that is, the investigators in Elko, and he asked me what he had told him. My answers were more or less vague. He asked me where Bill was, and I told him as far as I knew he was in San Francisco. He asked me where in San Francisco, and I told him I didn't know. He told me he would like to get in touch with him and asked me why Bill didn't come to see him in Reno, and I said, "Because I thought Bill was afraid of him," and he said, "That's a fine idea for him to bear in mind." That is about all. I saw him again that evening, just before I left on the train. I saw him at the depot at approximately



(Testimony of Lester Dale Haliman.)

10:30. I did not have an appointment with him. However, I was to see him later that evening. I called him from the depot. He came about five minutes after I called him because his bar is just across the street from where I called from. Just Judd and I engaged in the conversation.

Mr. Colvin: Q. What was that conversation, and I am offering it for the same purpose, your Honor.

Mr. McDonald: I make the same objection.

The Court: Same ruling, and an exception may be noted. [21]

#### EXCEPTION No. 4

He asked me more about Bill and the statements he made. I believe I did tell him at the time he had taken the serial numbers off the liquor. He asked me if I saw Bill to contact him. He told me he would like to find Bill and shut him up. He said he knew he could and he knew he could get him back in San Francisco, and he had friends in Alturas, that Bill lived there as well. There was something else, he told me he could buy his way out if he wanted to, but Bill put the finger on him and he was going to dump the whole thing in his lap. He asked for it. I don't believe that he said anything else. The date and place of the next conversation was April 3rd, at the Streets of Paris. That was the conversation I have already testified to. I had no further con-

(Testimony of Lester Dale Haliman.)

versations with the defendant before I testified before the grand jury. After I testified before the Grand jury the first conversation I had with him was at the Below Decks. I have been convicted of a felony. It was robbery in San Francisco in 1937. I am not on parole now. I have been discharged since October 1942. I have not been convicted of any other felonies.

Mr. Colvin: I have no further questions at this time.

The Court: We will take a recess at this time ladies and gentlemen of the jury. I want to advise you at this time to bear in mind the admonitions of the Court, that it is your duty not to converse among yourselves or with any other persons connected with the trial of this case, nor are you to form or express any opinion thereon until the case is finally submitted to you.

(Thereupon the Court took a recess for ten minutes.)

The Court: The jurors are present. You may proceed.

The Witness: (Continuing): Mr. Judd hit me on the left side of the head. He hit me with his right hand. There was nothing [22] in his hand when he hit me. I did not fall pursuant to the blow. I did not go backwards. He startled me when he hit me. That is all.

(Testimony of Lester Dale Haliman.)

Cross-Examination

By Mr. McDonald:

I was just startled; I was not frightened. My name is Lester Dale Haliman. I spell it H-a-l-i-m-a-n. Correctly, it is Halima, without the "n".

It is true that I have been convicted of a felony. I was convicted of a felony under the name of Lester Dale Haliman. I did not give my name to the District Attorney as "Haliman" for the purpose of concealing that fact. I have been convicted of one felony. I was not convicted of a felony in Stockton. I was arrested about the 18th day of March of this year in Elko, Nevada. I was arrested with a man by the name of William Beatty. I did not have certain liquor in my possession at that time. There was certain liquor in Mr. Beatty's automobile. I had driven from Reno to Elko with Mr. Beatty. I was arrested in Elko. I gave bond in that case. We posted bond before the United States Commissioner in Elko. I was represented by counsel there—Mr. Taylor Wines.

I believe that Mr. Judd was subsequently arrested. I was not present when he was arrested. Mr. Sheley was arrested also. They were arrested in the same case.

The man I refer to as "Bill" is Mr. William Nelson Beatty, Jr., who was arrested at the same time and place as I was. I do not know the date of the arrest. It was approximately the 18th. I had a hearing before the United States Commissioner. I am

(Testimony of Lester Dale Haliman.)

not really sure about whether it was a hearing. I believe the attorney waived a hearing. I was held to answer.

We were released on bail the following Sunday and I left that night and came to Reno. I left Reno the following [23] Tuesday night, I believe the night of the 27th. I was arrested Sunday, March the 18th, and released the following Sunday.

I met Mr. Judd and Mr. Sheley at the Below Decks Bar in this city on the 19th of April. It was approximately 8 or 9 o'clock in the evening. I first saw Mr. Judd at the service bar. It is directly across the room from the bottom of the stairs. You go downstairs and turn to the right to come in and the bar is straight across from you at the far side of the room. The service bar is at one end. If you are facing the bar, it would be the left end, not the extreme end, because there is a service bar too where they serve food. You come in the entrance and the stairs would be on that side on the corner and the bar is over there. The service bar is like this. There is another counter where they serve food and my station is right there and the rest of it is the main bar.

I did not see Mr. Judd when he came down the stairs but just afterwards. I had not told Mr. Judd that I was working at the Below Decks Bar. He came back and asked me if I had heard anything in the case in Reno. He said he heard "You were exonerated." I said, "Yes, so I am told," or something to that effect. He was standing next to



(Testimony of Lester Dale Haliman.)

my mother, about three feet from me, a little bit to my left. I had to lean across the bar to hear him. I don't know that he is quite deaf. I have not known Mr. Judd very long. I met him in Reno. I met him in company with Mr. Beatty. Mr. Beatty introduced me to him. I knew Mr. Beatty very well. That was a few days before our arrest in Elko. Mr. Beatty had been employed by him for some time. Mr. Beatty was a bartender. I have been a bartender. I don't know that Mr. Judd is deaf. I don't recall ever having difficulty in conversation with him. My voice is fairly well modulated, I think. He said, "I heard you were exonerated." He then told me that Sheley had been exonerated too and that he [24] had gotten a letter. Mr. Sheley was also a defendant in this same case. Then he asked about Bill. I told him I had not heard from him. If I did, I wasn't going to tell him. I knew where he was. He then asked me what was in the letter I got and if I was all through, if I would be called back to testify. He called me a liar and struck me and told me I wasn't through and he wanted to see me outside. When he asked me if I would be called back, he told me I had better not, and I told him I didn't know. I have had no further conversation with him since except here in court. I had another conversation over the phone with him. I did not tell him the whole thing could be straightened out for \$500.00. I do not know of anyone in my family phoning him, or anyone close to me phoning him. I do not know whether

(Testimony of Lester Dale Haliman.)

any friends did so at my direction. I do not believe so.

### Redirect Examination

By Mr. Colvin:

I was going to Salt Lake. My wife and I were making a visit to Salt Lake to visit her people. I had been in pretty close contact with Bill Beatty. He was working at Alturas. I would phone occasionally. I knew he was planning to be in Reno, so I wired him when he intended to be there. The plane was grounded on account of weather conditions and we took the train. We planned to continue by train or plane to Salt Lake City. When my wife got a reservation to Salt Lake, I was not able to get a berth, so I planned to take a later train. I knew that Bill was driving. Bill offered me a ride to Salt Lake City and I accepted.

He was employed by Warren Wilson in Alturas. Whether or not he was still working for him, I do not know; that was the last job I knew of. I do not remember the name of the bar but it was Alturas. I was not employed by Mr. Judd at that time. [25] I did not have any transaction with regard to the liquor with Mr. Judd or Mr. Beatty. I do not know exactly when I left Reno for Salt Lake City. I think it was about two days after I arrived in Reno. I did not have any conversation with Judd about the ride from Reno to Salt Lake City. I saw Mr. Judd on two or three occasions when Bill would go down to talk with him. I was more or less in the position of a hitch hiker.

(Testimony of Lester Dale Haliman.)

Recross-Examination

By Mr. McDonald:

It is not a fact that Mr. Beatty and I intended to open a bar in Elko. I never told Mr. Beatty that. I did not tell Mr. Beatty anything about trying to purchase a gun in Reno. I did not have a gun when I was in Reno. I did not have a gun when I was arrested in Elko. Mr. Beatty, I believe, had two guns.

The conversation at the Streets of Paris was not about \$45.00. I did not tell Mr. Judd that I purchased this gun that Mr. Beatty was found with in Elko, one of these guns, and that it was my gun but that I wanted Beatty to take the fall for it and admit the possession of it because my being an ex-convict, the possession of a gun in the State of Nevada would be a felony. I do not recall discussing with Mr. Judd the fact that two guns were found in the room occupied by Mr. Beatty and myself at Elko. There were two guns found at that time and place. I do not recall having discussed with Mr. Judd the fact that I had been convicted of a felony.

My wife was in Reno with me. We stayed at the El Cortez. When she left on this trip to Salt Lake City, we were staying at the El Cortez—that was in the middle of March of this year. Mr. Beatty was a bartender. He had been employed at Alturas. I do not know whether or not he was employed at Reno. Mr. Beatty was staying at the



(Testimony of Lester Dale Haliman.)

El Cortez too. I do not know whether or not he was working. After my wife left, he and I occupied the same [26] room. I do not know whether or not he was working for Mr. Judd but he was not gone long enough to be on an eight-hour shift as a bartender, if that is what you mean.

I went to the Depot Bar in Reno several times. I contacted Mr. Beatty by wire. I wired him in care of the Depot Bar. I wired him there because he told me it was the best place to contact him. He did not know where he would be staying but he had a friend that owned that place. He did not tell me he was working at the Depot Bar. He told me he had considerable money, about several thousand dollars. I saw the money. He did not have much cash; he had a check book with him. In Reno, I do not believe he had more than \$1000.00.

There was nothing discussed between Mr. Judd and myself about the purchase of a bar. There was nothing said about purchasing a bar in Elko. I knew nothing about Elko. Beatty and I did not discuss opening a saloon in Reno. We were out to The Cedars but there was no discussion about purchasing it. Beatty once in a while gets wild ideas about things like that but he did not give it serious thought.

We left from the El Cortez. I did not load the liquor into the car; I did not assist in the loading of the liquor. I knew the liquor was in the car. We were arrested immediately after we got to Elko; it was the following day. We went to a hotel. I



(Testimony of Lester Dale Haliman.)

did not register; Beatty registered for both of us. I paid the hotel bill when I got out of jail. It was my intention to share it. There was no reason why I did not register. I do not know the exact time we were arrested; I would say it was approximately 9 or 10 o'clock in the evening. We were arrested by the sheriff, under-sheriff and two or three city officers. We remained in jail for about a week. A bail bondsman was sent from Reno. I paid for the bail out of my own pocket. I returned to Reno. I saw Mr. Judd. I saw him first [27] in the restaurant and then again at the depot, but not in the bar. When I say "the depot," I mean the Southern Pacific Depot, the train depot. I had a conversation with him. He was very anxious to find Mr. Beatty. Mr. Beatty was in Reno at that time but he had not seen Mr. Judd. Mr. Judd asked me if I knew where he was. Mr. Judd, Mr. Beatty, Mr. Sheley and myself were co-defendants in the case. Mr. Judd wanted to see one of his co-defendants.

I returned to my job in San Francisco. I arrived in San Francisco the morning of the 28th. I was employed at the Streets of Paris at that time. I had been employed at the Streets of Paris before we left for Salt Lake. I went right back to work on the 29th. Mr. Judd came to the place on April 3rd. I was working at the service bar. I had approximately eight stools in the front bar and I was working the whole front bar at the time he came in. The bartender was out eating. It was

(Testimony of Lester Dale Haliman.)

an off-hour. Mr. Judd was alone. I had a conversation with him. Mrs. Yaggie, the cashier, was present; she was about five or six feet away from us. I knew she could overhear what was said. We discussed it after Mr. Judd left. He asked about the Grand Jury meeting. He asked me when it would come up and I said the 16th; I think he asked me if I would be there and we discussed the business of the serial numbers and Bill's whereabouts and this El Cortez business. I know that the El Cortez was robbed, because my wife and I and Mr. Beatty and his wife were there that evening, approximately one-half hour after it happened. I think the date was the 26th of March.

The Court: The witness may be excused.

Mr. McDonald: So that there will be no confusion in the record, Mr. Colvin and I thought it would be well that we stipulate that Government's Exhibit No. 1 and Government's Exhibit No. 2 in evidence bears the certification of the clerk of the United States District Court for the District of Nevada, [28] at Carson City, and that the certification was made on June 2, 1945, by Amos P. Diekey, the clerk of the court, by J. P. Todrin, Deputy.

Mr. Colvin: So stipulated.

BONITA YAGGIE,

called as a witness for the Government, testified in substance as follows:

The Clerk: Will you state your name to the Court and jury?

A. Mrs. Bonita Yaggie.

Direct Examination

By Mr. Colvin:

My name is Mrs. Bonita Yaggie. On April 3, 1945, I was employed at the Streets of Paris. I was working on that date. I know the defendant Clifford Judd when I see him. He is sitting right over there (The witness identifies the defendant Judd). I saw him on April 3rd. I saw him at the Streets of Paris. My position there was cashier behind the bar. Mr. Haliman was working there. He was present when I saw Mr. Judd. They had a conversation. I was present during that conversation. Mr. Judd asked where Bill was; Mr. Haliman said he did not know. Judd insisted that he should know and Mr. Haliman had better tell him. Mr. Haliman said he did not know and would not tell him if he did know. He said if Mr. Haliman did not tell him where Bill was, he would have the bond raised. He said he would have him picked up on the El Cortez robbery. Haliman said he could not have him picked up on the El Cortez robbery because he had not been there and he could prove that he was elsewhere. Judd said Dale had removed the serial numbers from the cases, and Dale



(Testimony of Bonita Yaggie.)

said he hadn't anything to do with that and he hadn't any reason for doing so. Judd said he was still going to do it and admitted he did it himself. He said that he was going to say that Dale and Bill must have pulled up by the side of the road [29] some place and removed the serial numbers, and Dale said, "You did it yourself. We had no reason to." Judd said, "Yes, I know, but I am not going to take the rap on it." Judd said that if Haliman testified against him, he would draw him into it, too. That he would draw him into the case. That is all that I can remember.

I did not hear any conversation about the Grand Jury in Reno. There might have been something, but I did not hear it. All I heard was about finding Bill and where he was. No, there was no further conversation after he made the remark about the serial numbers and if Haliman testified against him, he would draw him into the case. He got up and left.

I saw him after April 3rd. He was down at the Streets of Paris but he did not come to the bar where I was working. Haliman was not working there at that time. Judd was standing at the end of the bar and glanced down and I saw him but when I looked down again, he was gone. That was late in the evening. The next time I saw Mr. Judd was in court today. I did not see the defendant Sheley at any time.

Mr. Colvin: I have no further questions.

Mr. McDonald: If your Honor please, I ask that



(Testimony of Bonita Yaggie.)

this conversation be stricken from the record, and that all of the testimony of this witness be stricken from the record as incompetent, irrelevant and immaterial. It has nothing to do with the date of April 3 (April 19) and there is no evidence that there was any threat or intimidation of this man as a witness. I can see no purpose in this conversation from the evidence in this case, and I ask it be stricken.

The Court: The motion will be denied. You may have an exception.

### EXCEPTION No. 5

#### Cross-Examination

By Mr. McDonald:

It is not unusual for people to come into the Streets of Paris. It opens at 4 and closes at 2. People come in there during those hours. It is not unusual that Mr. Judd would come into the Streets of Paris. I know Mr. Haliman as Haliman, not Halima. He had a conversation with Mr. Judd looking for Mr. Beatty. He had not told me he was under indictment in Nevada. He had not told me that there was a complaint filed against him. I did not know why Mr. Judd was looking for Mr. Beatty. I knew nothing about the trouble Mr. Haliman was in. I paid attention to the conversation. There were three people at the bar—Mr. Haliman, myself and Mr. Judd and it was quiet and naturally I was going to listen, with nothing else to do. I had nothing else to do. It was between 5 and 5:30.

(Testimony of Bonita Yaggie.)

I have known Mr. Haliman for four or five months, maybe longer. He was an employee of the Streets of Paris. I was employed by the Streets of Paris. I met him in connection with my employment. I never saw Mr. Judd before. I would say he was talking in a normal tone of voice. He was a little closer to me than the reporter. I do not know whether Mr. Judd has ever seen me before or not. I have never seen him. They did not say what Mr. Haliman was going to testify to. There was some discussion about serial numbers.

The Court: We will take the noon recess at this time.

Ladies and gentlemen of the jury, please bear in mind the admonition the court has heretofore given you.

(A recess was then taken until two o'clock p.m.) [31]

Afternoon Session,

June 7, 1945, 2:00 P. M.

The Court: The jurors are all present. You may proceed.

BONITA YAGGIE

Cross-Examination (Resumed)

This discussion took place on the evening of April 3rd at the Streets of Paris. I worked at the Streets of Paris over a year. I have known Mr. Haliman for four or five months. I am not at

(Testimony of Bonita Yaggie.)

the Streets of Paris now. I left there about a month ago. I do not remember for sure when Mr. Haliman left there. I left there before he left.

I discussed my testimony with my husband, and Mr. Haliman and I have discussed it after Mr. Judd left. Not the testimony, but what Judd was talking about. I discussed it with Mr. Haliman. I discussed it with Mr. Colvin. I did not discuss it with Mr. Whitfield. I discussed this occurrence right after Mr. Judd left the bar that night.

#### Redirect Examination

By Mr. Colvin:

Mr. Colvin told me to tell the truth.

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#### MARIE V. COLE,

called as a witness on behalf of the Government,  
testified in substance as follows:

The Clerk: Will you state your name to the court and jury?

A. Mrs. Marie V. Cole.

#### Direct Examination

By Mr. Colvin:

I am Mr. Haliman's mother. On April 19th of this year, I was at the Below Decks. That is the place where my son is employed. On that evening, I saw both of the defendants. It was [32]

(Testimony of Marie V. Cole.)

sometime around nine o'clock, probably a little after. I was sitting on a stool in front of the service bar, talking to my son, when I first saw them. I first saw Clifford Judd (pointing to the defendant Judd). He came up and stood right beside me, his arm touching mine on the right. I did not see Mr. Sheley at this time. I first saw Mr. Sheley after Cliff Judd left.

There was a conversation between my son and Mr. Judd in my presence. It occurred shortly after I first saw Mr. Judd. There was no one else present besides Mr. Judd, Dale Haliman and myself. The conversation related to this case in Reno, Nevada. Mr. Judd came up to the bar and stood on my right side and said to my son, "I hear you are exonerated." My son said, "Yes, so I am." He then said, this Mr. Sheley, that he had been exonerated also. He asked my son how he knew he was exonerated, and my son said, "Well, I have a letter, too." He questioned him as to what was in the letter and my son mentioned the fact that he had been exonerated and his bond liberated. He asked him if he had seen Bill and my son said no. I don't remember just what he said then. There was so much conversation. He referred to the letter again and asked him what was in the letter. My son told him what it was. I don't know—I don't remember the words. There was a little talk back and forth. He then said to my son, "You are a God damn liar," and he jumped up and threw his body against the bar rail and smashed my son



(Testimony of Marie V. Cole.)

on the head with his fist. I grabbed him and pulled him back. I said, "How dare you come in and strike my son?" He said, "Who the hell are you?" I said, "I happen to be Dale's mother." He said, "I don't give a damn if you are." He did not hit me. He doubled up his fist. Judd then left the bar.

Then, Frank Sheley came in and stood on my left, behind me. I was directly in front of the service bar. He started on [33] the same line of questioning of my son. He wanted to find out where Bill was, and said that he had seen a statement which my son and Bill gave that said the liquor was purchased from Frank Sheley and Cliff Judd by Bill Beatty, and he had seen the statement signed by both my son and Bill Beatty. My son said he had not signed such a statement, but he insisted that he had. He asked my son if he knew where Bill was and if he was going to testify in this case.

The Court: Just listen and take it easy now. When this man Sheley asked your son whether he was going to be a witness and your son said he didn't know, was there anything further that Mr. Sheley said?

A. He asked where Bill was, and my son said that he didn't know. He hadn't seen him or heard from him. So he turned around and asked me, "Who are you?" and I said, "I am Dale's mother." He commenced talking to me and asked me where Bill was and I said I didn't know. He says, "If you

(Testimony of Marie V. Cole.)

know and you won't talk, there will be plenty of trouble and plenty of fights." He said, "We are not through with you yet."

Mr. Colvin: Did he say that to you or to Dale?

A. To me.

Mr. McDonald: I will ask that go out as incompetent, irrelevant and immaterial. The defendant is not accused of threatening this witness.

The Court: I will overrule the objection. Exception may be noted.

Mr. McDonald: Exception.

## EXCEPTION No. 6

### Direct Examination (Continuing)

I asked who he was and he said, "My name is Frank Sheley." He said, "You know where Bill is." I said, "No, I don't." He said, "Yes, you do." I said, "No, I don't, and neither does Dale know." I said, "Why come in and jump all over Dale. He didn't have anything to do with it." He said, "I am plenty mad. This is costing me \$500.00, and another thing, Judd didn't get the \$800 out of the whiskey." I said, "Why don't you ask Mr. Boyle? That is the proper thing to do." He says, "I have and he wont tell us." He said, "Do you know anything about lawyers?" And I said, "Not much." He said, "All lawyers are damn liars." I told him that I thought the proper thing to do would be to contact Mr. Boyle. He said they wanted to see Bill before the trial and shut him up before the trial

(Testimony of Marie V. Cole.)

so he wouldn't talk too much. He said, "If you want to save your son, you better get in touch with Cliff Judd and let him know where Bill is, or we will get both of you."

Dale was busy at the service bar when this was said. Dale was across the bar. It is a narrow bar. That was the substance of the conversation. He insisted upon knowing where Bill was so that they could shut him up. He stated, "Cliff Judd will kill any body who testifies against him. I would myself." That was the substance of the conversation. Then Frank Sheley walked out. Judd was not there during this conversation. Judd went out ahead.

### Cross-Examination

By Mr. McDonald:

Both of these men were looking for a man by the name of Bill Beatty. One part of the conversation was about Beatty and the other was that they did not want Dale to testify. Frank Sheley was trying to get in touch with this man Bill Beatty. They were talking about the whereabouts of Bill. They asked me [35] if I knew where Beatty was. I suggested they get in touch with Mr. Boyle. Mr. Boyle is an attorney in Reno, Nevada. I had never seen Mr. Judd before. I had never seen Mr. Sheley. I knew it was Cliff Judd when he said "Hello, Dale" and my son said "Hello, Cliff." I had been sitting there for just a little while—not very long—maybe ten or fifteen minutes; I wouldn't know.



(Testimony of Marie V. Cole.)

I was talking with my son. I don't drink; I never drink. I was talking with my son. I discussed my testimony with Mr. Colvin. My son and I have talked the matter over on a number of occasions. He wasn't knocked off his feet.

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LESTER DALE HALIMAN,

called for further cross-examination, testified as follows:

I testified this morning that my wife was staying with me at the El Cortez Hotel. My wife's first name is June. It wasn't Barbara. I don't recall a Barbara. I don't remember whether I told Mr. Judd I was going back to my job but that is what I planned to do. He came to the Streets of Paris when I was there. I don't remember whether I told him in my conversation of March 27th whether I was going to the Streets of Paris or not, but I did tell the bail bondsman. He could have gotten the information from him. It is not true that he told me that a girl by the name of Barbara, whom I knew in Reno, had been picked up in connection with the El Cortez robbery and that the girl had been frequently seen in Reno with me. The only girl who was ever seen in Reno with me was my wife. I believe the first evening that we were in Reno we had dinner with Bill and a woman, a Mrs. Someone—I don't remember her name. Bill seemed to know her fairly well. Other than that,



(Testimony of Lester Dale Haliman.)

no. She was not Bill's wife. I don't know what her name was. There was nothing said about a woman by the name of Barbara being picked up in connection with the robbery of the El Cortez Hotel and [36] that I might be implicated in it.

I knew that there was liquor in the car that I was riding in to Salt Lake. I saw the liquor loaded in the car. I had no part in the purchase of the liquor. I have a wrist watch. I did not offer the wrist watch as security to Mr. Judd for the purchase of this liquor. I have a wrist watch; it is insured for \$250.00. It was a present from my wife. I wouldn't be apt to give it as security.

#### Further Redirect Examination

By Mr. Colvin:

When my wife left Reno, she went home to her mother. I was to meet her there.

#### Further Recross-Examination

By Mr. McDonald:

My wife left Reno the day following our arrival there. I don't remember the actual date we left San Francisco, but if I look at a calendar, I might be able to tell you. I believe it was some time around the 16th of March. I worked Monday night at the Streets of Paris. We were to leave, I believe, the following Wednesday on the plane. The reservation was cancelled because of bad flying weather. We left the following morning. That would be

(Testimony of Lester Dale Haliman.)

Tuesday. We got in that night. She would have left Friday night, and I believe I left Sunday morning. We were arrested Monday. We went to Reno by train. We bought a ticket to Reno because we intended to stop there a day or two. I had worked there before and had a few friends there. It wasn't the purpose of my trip to see Mr. Beatty. I wired him that I was coming. I have other friends in Reno. I did not wire any of my other friends. I wired him because I had talked with him a week or two before. I do not know how long he had been in Reno before I got there. I know that he was employed at Alturas. I don't know that he quit his job in Alturas for the purpose of coming to Reno to purchase a bar. I did know [37] that he was in Reno. I wired him at Reno. We were to have dinner the evening I got in. Up to that time, I had never seen Mr. Judd in my life.

Mr. Colvin: No further questions. The Government has no further witnesses or other evidence to present at this time and rests its case.

Government rests.

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### CLIFFORD J. JUDD,

called in his own behalf, testified in substance as follows:

By Mr. McDonald:

If your Honor please, Mr. Judd is very hard of hearing and, if I may, might I stand closer?

(Testimony of Clifford J. Judd.)

Direct Examination

My name is Clifford J. Judd. I live in Reno at 529 Mill Street. I am manager of the Depot Bar. I have been so engaged since last August. I also have been in the Merchant Marine. I know the witness that testified here this morning, Lester Dale Haliman, or Lester Dale Halima. I knew him under the name of Haliman. I met him in Reno through a boy who was working for us or had been working for us. I don't recall if he was working on that particular day or not. The boy's name is Bill Beatty. This Bill Beatty is William Nelson Beatty, Jr., that has been referred to in the indictment that has been introduced as evidence in this case. Mr. Beatty introduced me to Mr. Haliman. His purpose in introducing me was that they had been friends for quite a while and they were going to try and buy a business in Reno if they could get one. That was when I first met him. They were interested in the saloon business. They wanted me to go out to a place called "The Cedars" to look at it. They said they could get it for a small down payment. It is out on South Virginia Street on the road to Carson City. I did not go out to look at it. Later he mentioned purchasing a place at Elko, Nevada. [38] He told me he was going to purchase a bar in Elko. He said that they had bought the bar there but they were short of merchandise. By merchandise, I mean whiskey; that is all they handled. Mr. Beatty wanted to borrow some whiskey from



(Testimony of Clifford J. Judd.)

me with the understanding that if he couldn't return whiskey of this certain type, he would pay me for the whiskey. I loaned him certain whiskey.

I met Mr. Haliman a few days before. He was with Bill at the time when they helped carry the whiskey out of the basement of my place. There was a discussion about security for this whiskey. He said he had not been working for quite a while but that Bill had \$4500 and it would take all the money they had to pay down on the place, but he took off a square wrist watch that had a large diamond on each corner and said that if I wanted to hold it as security, I could. I told him that Bill's word was good enough; that he had worked for us for several months at both places. When I say "both places," I mean another bar that we own in Alturas.

Afterwards, Mr. Haliman and Mr. Beatty were arrested in Elko, Nevada. I was also arrested. I was charged with certain violations of the Internal Revenue law and conspiracy. I don't recall the date I was arrested. I recall the incident. I was arrested shortly after they were—within a couple of days. I recall meeting Mr. Haliman after he was released from jail in Elko. I met him at the Waldorf Cafe in Reno. I had a conversation with him at that time. He asked me if I thought it would be very serious and I told him at that time I had found out I had been arrested and my attorney told me as far as I was concerned it didn't mean a great deal. That was our way of transacting



(Testimony of Clifford J. Judd.)

business. We did it prior to that and each and every time since. It is routine business in Nevada. Loaning or selling whiskey to other bars. I did not tell him how to testify. [39]

He spoke about some pistols that they found tied up in the window curtains. These pistols were found shortly after their arrest. According to Haliman, they were found in the room occupied by himself and Beatty at Elko. He said that he had done some time in San Quentin and that if you have done a penitentiary sentence in another state, they would call it a felony against him, and that Beatty was willing to say that he bought, that he owned, both pistols. Beatty was willing to testify he bought both pistols, in order to save Haliman who had been previously convicted of a felony, from being arrested for a felony in the State of Nevada. He asked me to testify to the fact that Beatty had two pistols. I told him Beatty went and tried to buy a pistol from a man that was working in the Bonanza Club, but I didn't know where the second pistol was. He had asked me if he could buy a pistol from me and I told him I didn't have a pistol in the establishment and wouldn't be interested in one. We don't have them.

He said that he would call me again that evening if Bill came in. I was anxious to see Bill and if he came in, he would let me know. He would call me just before the train departed. It is just across the street from my place of business. He called me

(Testimony of Clifford J. Judd.)

there. I went across the street to see him. We had a conversation at that time. There was nothing said about his testimony in the case in Nevada. It reverted back to the pistol that he had purchased from a man in San Francisco, who he said was a friend of his and he could go back and have the bill of sale at the time when they found the pistol made out to him. He said if he went back to this man, he would have him say that the pistol was sold to Beatty and that the bill of sale was made out in Dale's name and that the reason was that Beatty only [40] had \$100 and that the cost of the pistol was \$45, and the man made it out to Dale, but Dale just paid for it.

He told me that if I wanted to reach him, that I could reach him at the Streets of Paris. If there was anything he could do to get me out of trouble he would, but they haven't worried me then or since, other than the routine business which might happen. He then got on the train and went to San Francisco.

I came to San Francisco afterwards. My purpose in coming to San Francisco was to purchase or buy an interest in the Vanderbilt Bar that is located on Mason Street. I was making arrangements for the purchase of the bar. I saw Mr. Haliman a few days after he left Reno. I don't remember the date. I saw him at the Streets of Paris. I went to the bar about 5:30 in the evening. He was tending bar. There was a girl there. It was the young lady who testified here this morning. She was sitting down

(Testimony of Clifford J. Judd.)

in front of the cash register. I bought a drink. I bought one for Mr. Haliman and I think I asked her to have one. The three of us had a drink. He took the money and handed it to her, the cashier, who charges you for the drink, and the bartender gives you back the change. I commented on this.

There was nothing said about the case in Nevada. We had a discussion and he called me away from the cashier to the other end of the bar, down a few feet, where the cashier couldn't be listening I imagine. There was nothing said about the serial numbers of any liquor. I don't recall whether I asked him about where Mr. Beatty was. I didn't threaten him about testifying against me. I didn't know he was going to testify against me. I thought we were all charged with the same offense, all four of us—I thought that we were all defendants in the same case. I don't recall any discussion with him about [41] the case. We were very friendly at the time. I never heard serial numbers mentioned until now. It was never discussed at all. Nothing more was said. I didn't think that the case was very serious.

I saw him on an occasion after I saw him at the Streets of Paris. I saw him up on Market Street. I don't know the name of the place. I know the location. It is across from and down a ways from the Fox Theater. I don't know the address. It has a bar down in the basement. I went in the bar on that occasion. I didn't know Mr. Haliman was tending bar there at that time. When I went down there, I ran right into him. He was tending bar at that



(Testimony of Clifford J. Judd.)

time. There were people lined up on all sides of it. I don't know whether it was the service bar. I just walked up and started talking. I said "Hello" and he said "Hello" and something else. I didn't hear what he said. He leaned over the bar to ask me a question and I leaned over the bar to meet him, and I laid my weight on my left arm and there was music and I couldn't hear what he was saying. I didn't hear what he was saying. I leaned over the bar. He put up his left hand, just went up easily, and I put my right hand up and backed away. I don't remember if either one touched. I didn't strike him. I had no intention of striking him. When I put my arm up, I did it as an act. I didn't think and I didn't know that he had anything to be angry about. He kept on talking louder, but I couldn't hear what his words were, so I turned around and walked to the top of the stairs.

When I started down to the place, Mr. Sheley was with me. He came to the top of the stairs and there was a soldier or Navy boy from Reno. It was a soldier and he stopped and had a conversation with him and I just walked down.

On that occasion, I did not ask Mr. Haliman where Beatty was. I just got to say "hello" to him. I just said "hello" and [42] this trouble over the bar ended it. I didn't ask him if he was exonerated. I didn't know it at that time. I didn't tell him Frank Sheley had been exonerated. I didn't know it. Frank Sheley had been charged the same as I. He was charged the same as I and



(Testimony of Clifford J. Judd.)

as Haliman and Beatty. I didn't know that any of us had been exonerated. I didn't know whether or not the Grand Jury had met. I didn't know whether or not Mr. Haliman had testified before the Grand Jury. I thought we were all charged equally. I didn't know he had testified against me in Nevada. I had not been back to Nevada since I met him in the Streets of Paris. My attorney told me he would notify me when it was to come up. My attorney had not notified me at the time of this discussion. After I put my hand up, there was no further discussion between Mr. Haliman and myself. There was no conversation between us. I heard him say "hello", that was all. I did not hear the rest of the conversation.

Mr. McDonald: I think that it all.

The Court: We will take the afternoon recess. Ladies and gentlemen of the jury, please bear in mind the admonition of the court.

(Recess)

The Court: The jurors are all present. You may proceed.

### Cross-Examination

By Mr. Colvin:

I do not remember the first date I was in San Francisco this year. I have been down a number of times. I remember seeing Mr. Haliman about March 27th. I do not recall the exact date. The conversation took place at the depot in Reno. I came to San Francisco within a week after that

(Testimony of Clifford J. Judd.)

conversation. I remember a conversation with Mr. Haliman at which Mrs. Yaggie was present. I don't recall how long I had been in San Francisco [43] before that. I think I came down the week following that that he left and I went in to the Streets of Paris shortly after I came down. I do not recall the exact date. I don't remember whether or not I went in the day I came to San Francisco. I was buying a place here and there was quite a bit of money being invested and I made numerous trips. I don't recall the exact dates that I was here.

I remember the conversation at which Mrs. Yaggie was present and I remember a conversation at the Below Decks. I do not recall whether I went back to Reno between those conversations. I went to the Streets of Paris shortly after I arrived. I don't remember the exact dates. It could have been four or five hours after I came to San Francisco. I may have asked him where Beatty was. I don't remember definitely asking him that question but I know that I should have asked that. A doctor had been calling our place repeatedly that his wife was dying. I do not recall if I asked that particular question at that meeting. I am not sure whether I asked that question at that meeting. The doctor had called a number of times saying that Beatty's wife was dying.

I went to the Streets of Paris early in the evening. I would not know the hour other than they just opened up. I would not know the exact hour—I didn't pay a great deal of attention. I don't

(Testimony of Clifford J. Judd.)

know anything about the indictment. I knew we had already been charged. I knew we had been arrested. We had appeared before the Commissioner and posted bond. I don't believe it was a hearing—it lasted just a minute. I don't know what that would be. I knew there was a case in Reno. I knew Beatty also had been arrested. I knew that Sheley also was arrested and I knew that Haliman had been arrested. I knew it all had to do with the same transaction.

When I went to the Streets of Paris, Haliman asked me [44] how serious I thought the case was going to be. I told him I did not think it would amount to a great deal. I don't recall what his answer was. We talked about the case to the amount that I just stated. I didn't ask him if he was going back to Reno; whether or not he would testify was never mentioned. I don't know whether Sheley was in Nevada or California at that particular time. I don't recall definitely asking where Beatty was on that particular trip.

I came to San Francisco to purchase the Vanderbilt Bar at that time and brought down a deposit on it. I brought down \$23,000. I want to retract that statement. I believe I brought down the greater part of \$23,000 and I had a check in my pocket. I don't recall the exact amount of the check. It was lost. I don't recall the exact amount of it. I brought \$18,000. I brought \$18,000 in cash and wrote a check for \$5,000 after I was here. I didn't buy the bar. I worked there for a few



(Testimony of Clifford J. Judd.)

days until they told me to take my name off the license. I had purchased the bar to the extent that my name was on the license. At the time I had the conversation at the Streets of Paris, I was making preparation to buy the bar. The date of the 19th doesn't mean anything to me. I don't recall the date I had the conversation at the Below Decks. I never really worked there. I just started to buy the place.

I was present at the Vanderbilt Bar the day of the conversation at the Below Decks. I had been in and out of it throughout the day. I don't recall what time I was there. I don't recall the exact hour I went to the Below Decks. It was in the evening. It was show-time in the evening. I didn't understand your question. I didn't go directly to the Below Decks. I left the Vanderbilt Bar and went to the Fox Theater. I turned around and came back to the Below Decks. I didn't see any picture at the Fox Theater. I did go to the Fox Theater. I went to the box [45] office. I didn't go into the theater. I then went over to the Below Decks. I wouldn't know the exact hour. It could have been about 9 o'clock—an hour or an hour and a half one way or the other. I don't recall that far back. I don't remember the movie that we were going to see. I had not been with Sheley all that day. I don't recall what time I met Sheley, probably in the evening. He comes in in the evening. I don't recall the first time I met him that day.



(Testimony of Clifford J. Judd.)

I haven't gotten one of his last five questions. It would make it a lot easier for yourself and me if you would come closer.

I don't remember the time or place that I met Mr. Sheley.

A doctor phoned our place of business about Beatty's wife. Our place of business was the Depot Bar, Reno, Nevada. I didn't know William Nelson Beatty, Jr. had entered a plea in the Reno case. I have never heard of a plea of *nolo contendere*. I didn't know he had been arraigned before the Court any differently than we had. I was not particularly looking for Mr. Beatty. If I had met him, I would have repeated the conversation that the doctor gave us. I don't recall asking for him at the Streets of Paris. I knew that Haliman and Beatty were good friends. I saw Haliman at the Streets of Paris and I knew the doctor was trying to reach Beatty. I don't recall whether I mentioned it to Haliman or not. It was a later time and it didn't seem so important to me. I had no way of knowing where he was and they said his wife was getting along fine. My wife is very friendly with them. I didn't say I asked for Beatty at the Streets of Paris.

Mr. Colvin: Q. Do you remember the conversation that happened at the Below Decks?

A. May I have the reporter read the question.

The Court: Do you read lips? [46]

A. If they keep their head up and not look

(Testimony of Clifford J. Judd.)

around I never have any trouble, but when they back up and get their heads around, I can't hear plainly.

Q. Can you watch the lips?

A. As much as possible.

The Court: Stand in front of him and ask the questions, Mr. Colvin:

Cross-Examination (Continuing)

By Mr. Colvin:

The first thing that I did at the Below Decks was to walk up to the bar. I had never been there before. It was the first time I had been there. When I went over to the bar, I saw Haliman. I walked directly to where Haliman was standing. This was the first time I had seen him since I saw him at the Streets of Paris. Sheley remained at the top of the stairs, as I went down. The first thing I said was "Hello" to him. I was standing right against the bar when I said it. I started the conversation by saying "Hello." He said "Hello" back. I have never heard what else he said. I never understood anything further in the entire conversation after he said "Hello"; that was all. I did not stay at the bar very long; just long enough to say "Hello," lean over the bar, turn around and go out. It would be a matter of seconds. I wouldn't recall the amount.

(Witness demonstrates how he leaned over the bar.)

(Testimony of Clifford J. Judd.)

My head was down. I was leaning towards him. His head was almost touching mine. I was directly across the bar from him. My left arm was across the bar. My head was forward. The music was playing and I couldn't hear what he was saying. I wanted to hear what he was saying. He kept his conversation going, his arm right in my face like that. It would have been his left arm. I was leaning over like this, my right arm back like this and walked out. I leaned over like this and put my right arm up like this. I brought my right arm forward in such [47] a manner that my wrist crossed my face. Then I walked out. I had no further conversation—not another word.

I did not see Mrs. Cole there. I saw her here this morning but it is dark in the place. I don't remember seeing her. I don't remember seeing her at any time. I walked out of the bar.

Sheley had left the top of the stairs and come down. I did not see him leave the top of the stairs, but as I walked up to the bar and turned around, he came in and went behind me on my left and was standing a few feet in front of the bar. I first saw him just as I left. He walked out in front of the bar and had a talk with Dale and I thought he would follow me out. He was a little to my left. I walked past him. I saw him as I walked out of the bar. I did not stop and talk to him. I walked straight up the stairs. I next saw Sheley outside the place.

Nobody told me that Haliman was working at the Below Decks bar. I didn't know he was work-



(Testimony of Clifford J. Judd.)

ing there. The last time I saw him he was at the Streets of Paris. It is a coincidence that I met him at the Below Decks.

I didn't put up the money for the bond at Reno. I knew the bondsman. I have Beatty's address—the phone. His wife talks to me over the telephone.

I am not known by any other name than Judd. I have a nickname. It is "The Galloper." I got it when I was playing football.

### Redirect Examination

By Mr. McDonald :

I played football at Coquille High School and Military School. I was a backfield man. I acquired this nickname when I was in high school.

I travel back and forth from Reno to San Francisco quite [48] frequently. Some time in April—I do not remember the exact date—I entered into a transaction to purchase the Vanderbilt Bar on Mason Street in this city. I came down to San Francisco for that purpose. I brought down \$18,000 in cash and I made out a check for \$5,000 here. That was put in escrow pending the transfer of the state liquor license to my name and Mr. Rogers. There was \$3,000 left over. I didn't explain to Mr. Colvin, from the bankroll that I deposited in the bank. The money was deposited in one of the banks in this city pending the transfer of the license. The transaction fell through because of this



(Testimony of Clifford J. Judd.)

particular trouble. After I was arrested on this charge, I was advised by the State Board of Equalization that I would not be granted a license and I withdrew the money from that transaction.

On the night of April 19th, I went to the Fox Theater. It was around 9 o'clock, an hour one way or the other. I had met Mr. Sheley that day. I don't remember the time I met him. He comes in our place, drops in and out, and we live in the same hotel. I don't remember whether I met him at the hotel or at the place of business. He drops in. I think he spends most of his time at the Vanderbilt Bar. He also lives at the same hotel—the Continental Hotel in San Francisco. I don't recall whether I met him at the Vanderbilt Bar or the Continental Hotel. I met him some time that evening. We went by taxi to the Fox Theater. We didn't see the show. There was a long line when you get to the theater. They sell you tickets and you go in and you have to wait and we didn't feel like waiting. We left there. We went looking for a cab and this place is cater-corner from the Fox Theater, so we walked over there. There were two cabs pulling up, letting some sailors off. I don't remember whether Sheley or myself suggested that we go into the Below Decks. It could have been Mr. Sheley—I wouldn't [49] say. The cab that we were going to take had another load, so we had to wait. I didn't know Haliman was working at the Below Decks at that particular time. I went down to the bar. I saw him at the service bar. I said

(Testimony of Clifford J. Judd.)

"Hello" or I first—I don't recall, and he started a conversation that I couldn't hear. It seemed like there was music in there. It was real dark, so I leaned over the bar to hear what he said. I didn't hear what he said. He put up his arm and I swung my arm around to defend myself. There were no blows struck on either side. He was hollering quite loudly and I picked up and left. I didn't hear what he said. I left and went upstairs. I didn't get the first word he said.

I didn't know that the Grand Jury had met in Nevada. Mr. Robinson, my attorney, was going to advise me of that and he had not called me. I had no occasion to threaten Mr. Haliman. I didn't speak to him except to say "Hello." On the occasion at the Streets of Paris on April 3rd, he seemed very friendly; both of us were very friendly. I had no hard feelings towards him at that time and there were no threats. On the night I saw him at the Waldorf and the Southern Pacific depot in Reno, there were no threats made against him.

### Recross-Examination

By Mr. Colvin:

After my conversation at the Below Decks, the next time I saw Mr. Haliman was yesterday morning. I didn't return to the Below Decks after my conversation of that evening. Mr. Haliman phoned me. I had a conversation with him. It was the very next day or the day following the Below Decks. I have never seen him since

(Testimony of Clifford J. Judd.)

that time. I never went around to talk to him about the case. The next morning they served a warrant upon me in the Reno case. I first heard of the indictment in Reno the [50] day after I had the argument with Dale.

### Further Redirect Examination

By Mr. McDonald:

Mr. Haliman called me. He said that I was in enough trouble in Reno and that they had exonerated—I think that is the word—that the trouble was not against him and that he could make it easy. I think he said Mr. Whitfield or Whitehead and the United Marshal, and he asked the United States Marshal to stand over him that night and make it look bad for me. He told me on the phone he had the Marshal and he was going to guard him back and forth to work. I asked him why to guard him back and forth to work, and he said if I would give him \$500, he would straighten out the alcohol tax trouble in Reno; otherwise, he would have the United States Marshal bodyguard him. He said that would make it look tough for me. That was a day or two after the trouble at the Below Decks.

I knew I was indicted in Reno after I called Mr. Robinson to tell him I had been arrested in this case in San Francisco. He told me that these people were mixed up with me and had testified against me that they were free. That was the first that I knew about it.



## FRANK EDWIN SHELEY,

one of the defendants called as a witness, testified in substance as follows:

The Clerk: Will you state your name to the Court and Jury?

A. Frank Edwin Sheley.

## Direct Examination

By Mr. McDonald:

I am Frank Edwin Sheley. I reside in Reno, Nevada, at No. 244 East Taylor Street. I have been in trouble in the State of Nevada. I was convicted in the State Court there for receiving [51] stolen property and the case is now on appeal to the Supreme Court of the State of Nevada.

I know the complaining witness in this case, Lester Dale Haliman. I first met him in Reno. I never had any business with him. I saw him on the night of April 19, 1945, at the Below Decks. That evening I had been to the theater. I had met Mr. Judd at about 8:30 or 9 o'clock at the Vanderbilt Bar. He came in and we went to the Fox Theater. I met him at the Vanderbilt Bar and we decided to go to the Fox Theater. There was quite a line so we didn't go in. We went across the street to get a taxicab. I suggested getting a drink; about that time a soldier came along and said he knew me from Reno. We talked a few minutes and then I went downstairs. I suggested getting a drink. I know the name of the bar. It was a bar and I felt thirsty and went in. Mr. Judd preceded me



(Testimony of Frank Edwin Sheley.)

downstairs. I stopped and talked to a soldier that I had known in Reno. I subsequently went into the bar. I saw Mr. Haliman there. I asked him why he had me arrested and he said he had not had me arrested. I said that that is strange that I am charged with conspiracy for he and a fellow named Beatty having some whiskey, and I told him I had not sold him any whiskey and wondered why he had had me arrested and he said he hadn't. I asked him where Beatty was and he told me he didn't know, to see his attorney. He said as far as me being arrested, I would be exonerated. I asked him how he knew that and he said that he had heard today that he and I were both exonerated. That is the first I knew about it. The Commission in Reno when I was arrested told me that Haliman and Beatty had testified that they bought whiskey from Cliff Judd and I. They didn't buy any whiskey from me. I had none to sell. I never threatened him in any manner. I didn't tell him that Mr. Judd would kill him if he testified against him. I didn't tell him that I would [52] kill him if he testified against me because he had just told me that I had been exonerated.

I had no conversation with the lady who testified here today. I never saw her until today. I don't know her. I didn't see her in that place. There were quite a few people there. She didn't talk to me. I left, met Mr. Judd upstairs and we got into a cab and went back to the hotel. I did not speak to the mother of Mr. Haliman at the

(Testimony of Frank Edwin Sheley.)

Below Decks bar. I didn't ask her where Bill Beatty was. I didn't know where he was at that time. I didn't care where he was at that time.

Cross-Examination

By Mr. Colvin:

The Commissioner did not tell me that Beatty and Judd were going to testify when the case came up. He told me that Beatty and Haliman had been arrested in Elko with some whiskey in their possession and claimed that they bought it from Cliff Judd and I. That was the charge.

I asked Haliman where Beatty was and he told me to see his attorney. That is all he said. I have asked Judd where Beatty was. I don't remember when it was—before I went to the Below Decks. He said he didn't know where he was. I didn't go to the Below Decks to find out where Beatty was. I went down to get a drink. I had no idea Haliman was working there. It was a complete surprise when I saw him there. I didn't see Mrs. Cole there. No, I didn't see her; there were quite a few people there. I didn't pay any attention to whether or not there were any women at the bar. I saw him and started talking with him. I wasn't looking for any women.

I saw Judd leave before I started to talk to Haliman. I didn't say a word to him when he went out. I walked over. I don't remember whether I spoke or not, and asked him why he had me arrested when I saw it was him there. He said he didn't. [53] I was referring to the case in Reno. He said

(Testimony of Frank Edwin Sheley.)

he didn't have me arrested. I said that when I was arrested, I was informed by the Commissioner that he and Beatty had been caught with some whiskey and they claimed that they bought it from me. I was wondering why I was arrested. I don't recall the rest of the conversation.

I never called Mr. Judd "The Galloper." I always call him Cliff. I never saw the complaint. When I went before the Commissioner, I posted bail. He asked me if I pleaded guilty or not guilty and I posted bail.

I didn't say that I wouldn't blame Cliff for killing anybody that would testify against him. I don't know how long I was there; it was a very short while. I saw he was there and he told me he didn't have me arrested, and Judd had left, so I left. I didn't even have a drink there. I didn't see Judd talking to him. I was at the top of the stairs talking to a soldier when Judd went down. I didn't see him walk down. I went over to the bar to talk to Haliman without stopping. I didn't tell him that there would be plenty more fights before this case came to trial. I didn't tell him this was only the beginning. I had no conversation with any woman at the bar. If Mrs. Cole was there, I didn't see her. I was not interested. We never went back to the Below Decks after that time. I never had any conversation with Haliman after that time. I never saw him. I never found out where Beatty was. I did not make any more inquiries. I was not interested. I had been exonerated.



## CLIFFORD JUDD,

recalled for further Direct Examination, testified as follows:

Mr. McDonald:

I do not recall seeing this lady, Mrs. Cole, at the Below Decks. [54]

Mr. McDonald: That is all.

Mr. Colvin: No further questions.

Mr. McDonald: That is the defendants' case.

The Court: Is there any rebuttal?

Mr. Colvin: No rebuttal.

The Court: After the usual admonition, then adjourned until Friday morning, June 8, 1945, at 10 o'clock A. M.

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Friday, June 8, 1945,  
10:00 O'clock A. M.

The Court: Stipulated the jurors are all present?

Mr. Colvin: For the Government.

Mr. McDonald: Yes, your Honor.

The Court: Are the defendants present in the courtroom?

Mr. McDonald: Yes, your Honor.

The Court: You may proceed with the argument this morning.

(Thereupon the opening argument was made by Mr. Colvin, followed by Mr. McDonald's reply argument, and Mr. Colvin's closing argument.)



## CHARGE TO THE JURY

The Court (Orally): Ladies and gentlemen of the jury, I will ask you to give your attention to the court for a few minutes. You have listened to the arguments and heard the evidence in this case, and your labors are about to begin.

There is a difference between the function or province that the jury has and the province that the court has. It is the exclusive function of the jury to judge the facts of the case. The court can't interfere in that regard. It is the court's duty to instruct the jury as to the law that they should apply, and the jury must take that law from the court. They cannot disagree with that. We are both a part of the judicial process, [55] but we have two distinct functions, and I cannot infringe on yours, and you cannot invade my province. So, it is, therefore, your duty to take the law as the court gives it to you and to apply it to the facts.

Now, during the course of the trial the court has occasionally questioned witnesses and made comments in connection with rulings that the court has made on objection to evidence. You are not to conclude from any of these facts or circumstances that the court was intending to express any opinion as to the facts of the case or what your verdict should be. I only say those things and I only ask the questions or make the rulings in pursuance of the court's province. Indeed, it is the duty of the court to supervise the trial of the case and expedite the trial. So you are not to conclude from

anything the court said during the case as to any opinion the court may have as to the guilt or innocence of the defendants. That is your duty and you are to decide that.

There are some general rules that apply to all criminal cases. I wish to advise you of them now.

In the first place, you have to exclude any sympathy or any prejudice from your minds. You are not to concern yourselves in the matter of the punishment of the defendants, or either of them, in the event of a verdict of guilty. The matter of the punishment of the defendants or either of them in the event of a verdict of guilty is for the court to determine alone.

I state to you, it is your province to decide the factual issue of the case, which is the guilt or innocence of the defendants. You must bear in mind, as I told you at the time you were impaneled as jurors, that because the United States Attorney has filed an information or complaint against the defendants, that there is no presumption of guilt that flows [56] from that. On the contrary, at all stages of the proceedings the defendants, and each of them, are presumed to be innocent. This presumption remains until and unless the evidence introduced for or on behalf of the Government proves the guilt of the defendants, or either of them, to a moral certainty and beyond all reasonable doubt.

Now, of course, you should know what is meant by the term "a reasonable doubt." The best defi-

inition that I think I can give you as to the meaning of reasonable doubt is this: A reasonable doubt is a doubt resting upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture that may be suggested or imagined, but a fair doubt based upon reason and common sense, and arising out of the evidence presented. It is always difficult to prove facts to an absolutely and complete certainty. Therefore, as I have said, a reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture. Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony are matters solely within your judgment.

We start out with the presumption that a witness is presumed to speak the truth. However, that presumption may be repelled by the manner in which he or she testifies, by the character of his or her testimony, by contradictory evidence, by his or her motives, or by evidence as to his or her character and/or reputation as to truth, honesty and integrity. Based upon the credibility of the various witnesses you may accept the whole or any part of their testimony, or discard or reject the whole or any part thereof. If it appears to you and if it has been shown that a witness has testified falsely on any material matter you should distrust his or her testimony in any other particulars. [57]



In that event, you are free to reject all of the witness' testimony.

You have, in a way, an overall duty to scrutinize the testimony given by all of the witnesses, and as guides to you in doing that you may consider the following: The first set of circumstances under which the witness testifies is his or her demeanor or manner on the stand; next, his or her intelligence; also, the connection or relationship which he or she bears to the Government or to the defendants, or either of them; also, the manner in which he or she might be affected by the verdict; and to the extent to which he or she is contradicted or corroborated by other witnesses or evidence, if at all. Finally, you may consider any other matter which reasonably sheds light on the witness. You should disregard entirely any testimony stricken out by the court, or any testimony to which an objection has been sustained.

It is also your duty to receive with caution oral admissions testified to by witnesses, particularly oral admissions of a defendant.

In the course of their arguments, the attorneys in this case have commented upon and argued upon the facts. If you find any variance between facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts testified to by the witnesses. You may find discrepancies or inconsistencies are not material and do not affect the true issue of this case, and



if they do not reasonably bear upon the guilt or innocence of the defendants, or either of them, do not waste your time in considering them.

In every crime there must be a joint union or joint operation of act and intent. For you to convict the defendants or either of them in this case, both elements must be proved to a moral certainty and beyond all reasonable doubt. Such intent is [58] merely the purpose or willingness to commit an act. It does not require a knowledge that such an act is a violation of the law. A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural and probable and usual consequences of his or her own act.

One of the attorneys in his argument stated to you that a judge had said that jurors should not check their intelligence when they go into the courtroom. I agree with that and, perhaps, can add that you should use your good sense, ladies and gentlemen of the jury, just as you would in acting upon the most vital and important matters pertaining to your own affairs. You should resolve the facts of the case according to your deliberate and cautious judgment in the light of your own knowledge, and in the light of the natural tendencies and propensities of human beings.

You have been instructed that the defendants, and either of them, are entitled to any reasonable doubt you have in your mind. At the same time, if you have no reasonable doubt concerning the

guilt of the defendants, or either of them, the Government is entitled to a verdict.

If a defendant in this case has testified on his own behalf, that being so you will determine his credibility according to the same standards applied to any other witnesses. You will not hold it against him that he testified upon his own behalf. At the same time, you will treat his testimony just the same as if he were an ordinary witness in the case, according to the standards of credibility which I have already given you. You may consider in connection with the testimony of the defendant, the interest that he has in the case; his hopes and his fears, and what he has to gain or lose as a result of your verdict.

Now, ladies and gentlemen of the jury, the information in [59] this case, as I already advised you at the time of your impanelment, charges the two defendants, Clifford J. Judd and Frank Edwin Sheley, on or about the 19th day of April, 1945, here in San Francisco, with knowingly, willfully and unlawfully, by threats and by force, endeavoring to influence, intimidate and impede one Lester Dale Haliman, who was a witness in the United States District Court for the District of Nevada in a case pending in said district court by the United States of America against Clifford J. Judd and one William N. Beatty.

The defendants entered pleas of not guilty to that charge, thus placing in issue all of the material allegations of that charge in the information.

What you are to consider in this case is whether or not the two defendants, Judd and Sheley, did knowingly, willfully, and unlawfully, by threats and by force, endeavor to influence, intimidate and impede Lester Dale Haliman.

The charge made in this information cites its authority in a statute of the United States, section 241 of Title 18 of the United States Code, substantially, as to its pertinent parts, provides:

“Whoever by threats or force shall endeavor to influence, intimidate, or impede any witness in any court of the United States shall be punished” as provided in the statute.

A witness in the case, of course, is one who knows or who is supposed to know material facts, and who is expected to testify to them in court, or to be called upon to testify, although he may not have been actually and formally subpoenaed in the case.

This section of the law that I have given you the pertinent parts of was designed to protect the administration of justice in the Federal courts and those participating therein. [60] Acts of violence, though criminal under State laws, are offenses against the United States only and when and because they thus affect the administration of justice of the United States. It is necessary to Federal jurisdiction in this case to prove that there was a proceeding in the courts of the United States; in this case, in the District Court of Nevada; that



the man named Lester Dale Haliman was a witness therein; that the defendants, and each of them, or either of them, had knowledge of both those circumstances, namely, that there was a case pending in the District Court of Nevada, and that the man named, Haliman, was a witness therein, and that they intended by the alleged threats or the force used to either punish Haliman on past testimony given by him in the case, or to prevent him from testifying further in the case.

It is not necessary that the Government prove that the knowledge of each defendant that the person intimidated was a witness in the Federal court to be an absolutely or a direct knowledge that the person intimidated had testified or would testify. It is sufficient that the Government prove that each defendant had such knowledge, or a reasonably founded belief thereof. Of course, the Government must prove that the person intimidated was in fact a witness in a Federal case.

Mere conjectures or suspicions are not sufficient upon which to base a finding of guilty in this case or in any criminal case. Suspicious circumstances are not in themselves sufficient to convict the defendant, but proof must be, as stated to you, to a moral certainty and beyond all reasonable doubt.

To make it quite clear as to what the burden of the Government is in the prosecution under this particular statute, I will restate it to you in a little different form. It is the burden of the



Government in this case to prove to your satisfaction, [61] to a moral certainty and beyond all reasonable doubt, that there was a proceeding pending in the United States District Court in and for the State of Nevada, and that Haliman was a witness in such action, and that the defendants had knowledge of both the pendency of the action in the District Court of Nevada, and that Haliman was a witness in said action, that they intended to punish him for past testimony given by him in that proceeding in Nevada, or that they intended to prevent him from testifying in the future.

If you are satisfied beyond all reasonable doubt and to a moral certainty that the facts substantially are as I have just said, and were so presented, you may find the defendants, or either of them, guilty.

If you are not satisfied beyond all reasonable doubt and to a moral certainty, then you may find the defendants, or either of them, not guilty.

I have used the expression, "the defendants or either of them." In all events, I have instructed you as to the law of the case. I now instruct you that you may find in this case according to the evidence both of the defendants guilty, both of the defendants not guilty, or you may find one of the defendants guilty and the other defendant not guilty. It is your exclusive province to determine that issue from the evidence that has been presented.

Now, ladies and gentlemen of the jury, I want to say to you in concluding the instructions, that if you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any one of you should be convinced your view of the case is erroneous, do not be stubborn, and do not hastily abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view if after a full exchange of [62] ideas you still believe you are right.

I wish to advise you that if it becomes necessary to communicate with the court during your deliberations, or upon your return to court, upon any matter connected with the trial of the case, you should not indicate to the court how you stand numerically on the question of the guilt or innocence of the defendants. This caution the jury is to obey at all times after the case is submitted, until the verdict is reached.

Whenever all of your number have agreed upon a verdict, that is the verdict of the jury. In other words, your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady, as the case may be, and he or she will sign your verdict when agreed upon by all of your number, and he or she will act as your spokesman in the future conduct of this case in this court.

Do either counsel wish to note any exceptions to the charge?

Mr. Colvin: No, your Honor.

Mr. McDonald: No, your Honor.

The Court: Ladies and gentlemen of the jury, the clerk has prepared a form of verdict for your convenience which reads as follows:

“We, the jury, find as to the defendants at the bar as follows:

“Clifford J. Judd.”

There is a line after that, and below that appears:

“Frank Edwin Sheley.”

There is a line after that.

After each of those names you will insert the verdict of the jury.

You may now retire. [63]

Let the record show that the jury was about to leave the courtroom and the court wished to give the additional instruction to the jury.

I want to call your attention to this one other instruction, but do not think in so instructing you I am not giving this instruction undue emphasis over any other instruction I have given.

I have overlooked giving this instruction as a part of the body of the instructions, so you are not to attach any more importance to this than any other instruction, but you are to accept it as the law in the case.

There has been some evidence presented in this case that prior to April 19, 1945, which is the date



that the offense alleged in the information was alleged to have taken place, certain conversations were held between the defendant Judd and certain witnesses who testified in the case, and the defendant Sheley was not present at these conversations. As to any conversations by the defendant Judd alone, those conversations are admissible in evidence and may be considered by you only as against defendant Judd, and are not to be considered by you as evidence against the defendant Sheley. To repeat, I am referring now to conversations had by witnesses with the defendant Judd alone. Those conversations may be considered by you as evidence only against the defendant Judd, and not against the defendant Sheley.

Is there any exception to the last instruction given?

Mr. McDonald: No exception. I don't think your Honor instructed the jury on the proposition of a witness convicted of a felony.

The Court: I want to say to you one of the standards to keep in mind along with the standards you can use in judging a witness is, where it appears a witness has been convicted of a [64] felony you will take that into account and you may distrust that testimony and you may give it such weight as you feel it is entitled under all the facts and circumstances of the case.

The jury may now retire.

(Thereupon the jury retired to deliberate



upon its verdict, and subsequently returned to the courtroom with a verdict.)

And not, within due and legal time after the aforesaid judgment, and within the time fixed by the Court for the preparation, service and filing of the Bill of Exceptions, the defendant herein serves, lodges and presents this, his Proposed Bill of Exceptions, to be used upon his appeal heretofore taken to the United States Circuit Court of Appeals from the aforesaid judgment, and prays that the said Bill of Exceptions be, by the Court, settled, approved and allowed, and that the same may be used on the appeal of said defendant to said United States Circuit Court of Appeals.

Dated this.....day of July 1945.

FRED McDONALD

JOSEPH P. LACEY

HARMAN D. SKILLIN

Attorneys for said Defendant

Receipt of a copy of within Bill of Exceptions admitted this 24 day of August 1945.

FRANK J. HENNESSY

United States Attorney

By REYNOLD H. COLVIN

Assistant United States At-  
torney [65]

## STIPULATION

It Is Hereby Stipulated that the foregoing fifty-three pages truly set forth the proceedings upon the trial of the defendant Clifford J. Judd and that they contain, in narrative form, all of the testimony taken upon said trial, together with all objections made by the said defendant and the rulings thereon and the exceptions noted by said defendant, and that the foregoing may be settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And It Is Further Stipulated that an Order be made by the Court that the Clerk of said Court file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK J. HENNESSY,

United States Attorney.

By REYNOLD H. COLVIN

Assistant United States At-  
torney

.....  
Attorney for Plaintiff

JOSEPH P. LACEY

HARMAN D. SKILLIN

FRED McDONALD

Attorneys for Defendant [66]

**ORDER SETTLING BILL OF EXCEPTIONS**

Pursuant to the stipulations of counsel, it is hereby ordered that the foregoing document, containing fifty-three pages, lodged with the Clerk of this Court, entitled "Defendant's Proposed Bill of Exceptions" may be and the same is hereby considered to truthfully set forth the proceedings upon the trial of the defendant, Clifford J. Judd and that it contains in narrative form all of the testimony taken at said trial, together with all objections made by said defendant, and the rulings thereon, and the exceptions noted by said defendant, and it may be and is hereby settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further ordered that the Clerk of the said Court file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Dated this 27th day of August 1945.

I. M. GOODMAN

Judge of said United States  
District Court.

[Endorsed]: Filed Aug. 27, 1945. [67]

[Title of District Court and Cause.]

To the Clerk of the United States District Court:

You will please use the following papers in preparing the transcript on appeal in the above entitled matter:

- (1) Indictment.
- (2) The Plea thereto.
- (3) The Verdict.
- (4) Bill of Exceptions.
- (5) Assignments of Error.

JOSEPH LACEY

HARMAN D. SKILLIN

FRED McDONALD

Attorneys for Appellant

[Endorsed]: Filed Nov. 6, 1945. [68]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 68 pages, numbered from 1 to 68, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of



America vs. Clifford J. Judd, et al., No. 29407-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$1.95 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 27th day of November, A. D. 1945.

[Seal]                      C. W. CALBREATH,  
Clerk

By E. VAN BUREN  
Deputy Clerk [69]

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[Endorsed]: No. 11117. United States Circuit Court of Appeals for the Ninth Circuit. Clifford J. Judd, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed December 11, 1945.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the twenty-fourth day of August in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Francis A. Garrecht, Senior Circuit Judge, Presiding, Honorable Clifton Mathews, Circuit Judge, Honorable William Healy, Circuit Judge.

No. 11117

CLIFFORD J. JUDD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. Fred McDonald, counsel for appellant, for an extension of time within which to have settled and to file the bill of exceptions on the appeal in the above entitled cause, and of his supporting affidavit, and of the consent of Mr. Frank J. Hennessy, United States Attorney, thereto, and by direction of the Court,

It Is Ordered that the time within which the bill of exceptions herein may be settled and filed be, and hereby is extended to and including August 27, 1945.

No. 11,117

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

OPENING BRIEF FOR APPELLANT

---

JOSEPH P. LACY,  
Mills Building, San Francisco, Calif.

HARMON D. SKILLEN,  
Mills Tower, San Francisco, Calif.

FRED McDONALD,  
Mills Building, San Francisco, Calif.

*Attorneys for Appellant.*

FILED

FEB 20 1945

PAUL P. O'BRIEN,  
CLERK





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United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

OPENING BRIEF FOR APPELLANT

---

The appellant was prosecuted by an Information filed by the United States Attorney for the Northern District of California which alleges as follows:

“Now comes Frank J. Hennessy, United States Attorney for the Northern District of California, and by leave of Court first had obtained, informs this Court; That Clifford J. Judd and Frank Edwin Sheley (hereinafter called ‘said defendants’), on or about the 19th day of April, 1945, at the City and County of San Francisco, State of California, within said Division and District, did knowingly, wilfully and unlawfully, by threats and by force, endeavor to influence, intimidate and impede one Lester Dale Haliman, the said Lester Dale Haliman

being a witness in the United States District Court for the District of Nevada in the case of the United States vs. Clifford J. Judd and William N. Beatty, a proceeding before the said District Court for the District of Nevada, as the said defendants then and there well knew.”

(TR. 2-3)

Having been found guilty upon the charge he was sentenced to imprisonment for a period of six months and to pay a fine in the sum of \$500. From the aforesaid judgment and sentence he appeals to this Honorable Court. (TR. 8)

### JURISDICTIONAL STATEMENT

(Rule 24, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdictions are as follows:

(1) *The jurisdiction of the District Court.* USCA Sections 41 and 371. The latter section provides that the Federal Courts shall have exclusive jurisdiction “of all crimes and offenses cognizable under the laws of the United States”. Also the Constitution of the United States, Amendment VI:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed.”

(2) *The jurisdiction of this Court upon appeal to review the judgment in question.* Section 128 (a) of the Judicial Code:

“The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238.”

(3) *The pleadings necessary to show the existence of jurisdiction.*

(a) The information. (TR. pages 1-4.)

(4) *The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:*

The United States Attorney for the Northern District of California filed the foregoing information which we have set forth *in haec verba*.

In accordance with the rules of this Honorable Court we now set forth the ensuing:

---

#### ABSTRACT OF THE CASE

We set forth the following proceedings had and testimony given upon the trial of the cause, omitting what we deem immaterial:

The government offered in evidence certain documents to-wit, certified copy of an indictment, in case No. 11171 in the District Court of the United States of America in and for the District of Nevada, United States of America, plaintiff, vs. William Nelson Beatty, Jr., and Clifford J. Judd; and a copy of the docket entries in that case.

Mr. McDonald: To which we object as incompetent, irrelevant and immaterial. The proper foundation has not been laid. It has not been shown that this defendant is the defendant mentioned in the papers that Mr. Colvin has in his hand. We have the further objection that these papers are not the best evidence, that there is no showing why the original records of the Court have not been brought here. We submit the objection on those grounds.

The Court: I will overrule the objection, and I will note an exception for you.

### EXCEPTION NO. 1

Mr. Colvin: May it please the Court, I should like the Court's permission at this time to read government's Exhibit No. 1 to the jury, simply because their understanding of the indictment.

The Court: It is in evidence. You may read it if you wish.

Thereupon the said Indictment (Tr. p. 15) was read to the jury.

Lester Dale Haliman,  
called as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

### Direct Examination

I was before the grand jury at Carson City, Nevada, on April 16, 1945. I testified before the grand jury. I have heard the reading of an indictment which is government's Exhibit No. 1 in this courtroom. I testified to the facts set forth in that indictment. I came back to Reno after testifying and took the train that night



and returned to San Francisco the next day. I got in in the morning. I got in the morning of the 17th at approximately seven o'clock. I think it was the night of the 19th, the first night I worked, I didn't work this side. On the 19th of April 1945 I was employed at the Below Decks at 1285 Market Street. My employment there was a service bartender. I believe I went to work at about five o'clock or a little before. I know Clifford Judd. He is sitting directly behind you in the courtroom. I will point him out to the Court and ladies and gentlemen of the jury. (The witness identified the defendant Judd.) I know Frank Sheley. He is here in the courtroom. He is the gentleman over there with glasses. (The witness identified the defendant Sheley.) I saw both of them on the 19th of April 1945. I saw them at the Below Decks where I was employed. I would say that I saw them somewhere in the vicinity of eight or nine o'clock in the evening. I saw Judd first. The Below Decks is below the street level. If you are facing the building on the extreme left hand side is the entrance to the building. When you reach the bottom of the stairs there is a bar on the other side of the room. The bar would be across the room, and I imagine the room is twenty-five or thirty-five feet wide. Perhaps that, or more. I am not a very good judge of distance, perhaps more. I first saw Judd when he got to the bottom of the stairs. I do not know whether there was anyone with him. I did not see Sheley until a few minutes later. Judd reached the bottom of the stairs. He walked across the room toward me, smiled and said, "Helloe Dale," and I said "Helloe Cliff." I then came back to the bar,

and I noticed Sheley then. He was standing ten or fifteen feet away. That was the first time I saw Sheley. Judd said, "I heard you were exonerated," and I said, "Yes, that's right," and he said "Sheley was exonerated, too. He got a letter," and he said, "How did you know you were?", and I said, "I got a letter, too." He said, "What did the letter say?" and I said, "Well, just something to the effect that my bond had been liberated and I had been exonerated." He said, "Have you seen Bill?" and I said, "No," and he said, "Are you all through or will you be going back there to testify?" and he said, "If you are, you had better not", and he asked me again—. Perhaps I could show you the relative position of myself and Mr. Judd while this conversation took place. The service bar at the Below Decks, where I am employed, is at one end of the bar. I handle no service for the front bar patrons; just for our cocktail waitresses. I believe that night there were four working. It is hard to describe. Right directly in front of me like a space—so I took my station where the waitresses come for the drinks, and there is a rail coming down over the bar. This is on my left, and there are stools for the front bar. My mother was sitting in the corner by the rail with the stool closest to me. When Judd came up to the bar he came right beside her and when I was talking to him most of the time I was leaning over in that direction, and there is a cooler that projects on the inside of the bar that sticks out so far, (the witness indicating about three feet). I think that explains it pretty well. I gave you part of the conversation. The next thing that happened, he asked me to repeat how the letter was worded, and

I said, "I don't know exactly, just something to the effect that I had been exonerated and I had been liberated," and with that, he said, "You are a damn liar," and reached across the bar and struck me on the side of the head, and my mother was sitting there and said, "How dare you strike Dale?" He said, "Who the hell are you?" and she says, "I happen to be his mother." He said, "We want to see you outside" and left. I don't believe Sheley was within earshot during this conversation. He was (17) approximately ten feet away. The next thing that happened, Sheley came over and said that he and Judd had seen signed statements by Bill Beatty and I to the effect that Judd purchased liquor from Sheley, and I denied that. He asked me where I could find Beatty and if I could tell him where he was. I told him I did not know. He told me I did know, and was a liar. I said, "It doesn't make any difference whether I did or not, and if I did know I wouldn't tell you anyway," and he said, "Is that your answer?" And I said, "Yes." They said they were very anxious to find Beatty and he said he wouldn't blame Judd for killing anyone that testified because he would do the same thing himself. There was more conversation. I don't remember it word for word, except Sheley said he was pretty mad about the case, that it cost him a lot of money, and he told me Judd wanted to be my friend, and he said that he was half crazy, that he was upset, and that he was facing the penitentiary, and that he believed that he had been drinking. That was all the conversation. He talked to my mother as well. I couldn't hear that; just a word once in a while. I had no further conversation with Judd.



Judd had left. I was present at this conversation with my mother. This was a conversation between my mother and Sheley.

I had been arrested in connection with the case in Nevada. At that time I appeared before the grand jury I was under arrest in that case. I was not indicted. The earliest conversation I had with Mr. Judd regarding this case was April 3, 1945, in the Streets of Paris in San Francisco, where I was also employed. This took place, I think, about five o'clock in the evening. There was present besides myself and Judd, Miss Bonita Yaggie.

Mr. Colvin: Q. With reference to the case at Reno, Nevada, what conversation did you have with Mr. Judd?

Mr. Mc Donald: If your Honor please, I will object to this as incompetent, irrelevant and immaterial, and further that it (18) goes to a transaction not laid in the indictment, and I can see that it has no place in this case. This is a case of a threat made upon April 19.

The Court: I will overrule the objection.

Mr. Mc Donald: Exception.

The Court: You may have an exception.

## EXCEPTION No. 2

Judd came into the bar and asked me if I had seen Bill Beatty, the defendant, and I told him I hadn't. He asked me when the case was coming up, if I knew, and I said I was about to be called before the grand jury on the 16th but I wasn't sure of the date, and he talked over the case quite a bit. He told me he wasn't going to ride the beef on the liquor and destroying the serial numbers. He said he would have to say we stopped



somewhere along the road and destroyed them ourselves. He admitted that he destroyed them. He told me that he was going to have our bonds raised and that the bondsman was a friend of his, and he didn't care if he raised his along with ours, that he had plenty of money. I understood that we would have to stay in jail unless we could raise money to meet our bonds. He also told me he was going to have me picked up for the El Cortez robbery in Reno. I told him that was silly because I could (19) prove where I was that night, and he said he didn't know about that, that I will be picked up, and that he had known that, and he told me if I testified against him I would be dragged into the case, too, and that is about the text of it. He got up and left. This conversation lasted about fifteen minutes at the most. I cannot think of anything I haven't told you. There was a conversation before this in reference to this case. I believe it was on the 27th of March. It took place in Nevada. I had two conversations with him. They were both on the same day, on the 27th of March. One took place in the Waldorf. It is a restaurant and bar in Reno. I think it was late in the afternoon at about approximately four o'clock. There were a number of people present, but I don't think anyone was within earshot. No one else was a party to the conversation.

Mr. Colvin: Q. What was the conversation as it related to the Nevada case?

Mr. Mc Donald: We object to that as incompetent, irrelevant and immaterial, as a transaction not laid within the issues of this indictment. It is remote and far afield, and incompetent, irrelevant, and immaterial.

The Court: I think the objection goes to the weight of that testimony. I don't know whether you are making now a fur-(20)ther objection to that testimony, or to the proposed testimony.

Mr. Mc Donald: I ask that be stricken, and I am objecting to this testimony.

The Court: I will deny your motion and you may have an exception. For the same purpose this conversation now about to be stated by the witness will be admitted, and an exception will be noted.

### EXCEPTION NO. 3

He asked me what Bill had told him, that is, the investigators in Elko, and he asked me what he had told him. My answers were more or less vague. He asked me where Bill was, and I told him as far as I knew he was in San Francisco. He asked me where in San Francisco, and I told him I didn't know. He told me he would like to get in touch with him and asked me why Bill didn't come to see him in Reno, and I said, "Because I thought Bill was afraid of him," and he said, "That's a fine idea for him to bear in mind." That is about all. I saw him again that evening, just before I left on the train. I saw him at the depot at approximately 10:30. I did not have an appointment with him. However, I was to see him later that evening. I called him from the depot. He came about five minutes after I called him because his bar is just across the street from where I called from. Just Judd and I engaged in the conversation.

Mr. Colvin: Q. What was that conversation, and I am offering it for the same purpose, your honor.

Mr. Mc Donald: I make the same objection.

The Court: Same ruling, and an exception may be noted. (21)

#### EXCEPTION NO. 4

He asked me more about Bill and the statements he made. I believe I did tell him at the time he had taken the serial numbers off the liquor. He asked me if I saw Bill to contact him. He told me he would like to find Bill and shut him up. He said he knew he could and he knew he could get him back in San Francisco, and he had friends in Alturas, that Bill lived there as well. There was something else, he told me he would buy his way out if he wanted, but Bill put the finger on him and he was going to dump the whole thing in his lap. He asked for it. I don't believe that he said anything else. The date and place of the next conversation was April 3rd, at the Streets of Paris. That was the conversation I have already testified to. I had no further conversations with the defendant before I testified before the grand jury. After I testified before the Grand Jury the first conversation I had with him was at the Below Decks. I have been convicted of a felony. It was robbery in San Francisco in 1937. I am not on parole now. I have been discharged since October 1942. I have not been convicted of any other felonies.

The Witness: (Continuing): Mr. Judd hit me on the left side of the head. He hit me with his right hand. There was nothing (22) in his hand when he hit me. I did not fall pursuant to the blow. I did not go backwards. He startled me when he hit me. That is all.



## Cross-Examination

By Mr. Mc Donald:

I just was startled; I was not frightened.

It is true that I have been convicted of a felony. I was convicted of a felony under the name of Lester Dale Haliman. I did not give my name to the District Attorney as "Haliman" for the purpose of concealing that fact. I have been convicted of one felony. I was not convicted of a felony in Stockton. I was arrested about the 18th day of March of this year in Elko, Nevada. I was arrested with a man by the name of William Beatty. I did not have certain liquor in my possession at that time. There was certain liquor in Mr. Beatty's automobile. I had driven from Reno to Elko with Mr. Beatty. I was arrested in Elko. I gave bond in that case. We posted bond before the United States Commissioner in Elko. I was represented by counsel there—Mr. Taylor Wines.

I believe that Mr. Judd was subsequently arrested. I was not present when he was arrested. Mr. Sheley was arrested also. They were arrested in the same case.

The man I refer to as "Bill" is Mr. William Nelson Beatty, Jr., who was arrested at the same time and place as I was. I do not know the date of the arrest. It was approximately the 18th. I had a hearing before the United States Commissioner. I am not really sure about whether it was a hearing. I believe the attorney waived a hearing. I was held to answer.

We were released on bail the following Sunday and I left that night and came to Reno. I left Reno the following (23) Tuesday night, I believe the night of the 27th. I was arrested Sunday, March the 18th, and released the following Sunday.



I met Mr. Judd and Mr. Sheley at the Below Decks Bar in this city on the 19th of April. It was approximately 8 or 9 o'clock in the evening. I first saw Mr. Judd at the service bar. It is directly across the room from the bottom of the stairs. You go downstairs and turn to the right to come in and the bar is straight across from you at the far side of the room. The service bar is at one end. If you are facing the bar, it would be the left end, not the extreme end, because there is a service bar too where they serve food. You come in the entrance and the stairs would be on that side on the corner and the bar is over there. The service bar is like this. There is another counter where they serve food and my station is right there and the rest of it is the main bar.

I did not see Mr. Judd when he came down the stairs but just afterwards. I had not told Mr. Judd that I was working at the Below Decks Bar. He came back and asked me if I had heard anything in the case in Reno. He said he heard "you were exonerated." I said, "Yes, so I am told," or something to that effect. He was standing next to my mother, about three feet from me, a little bit to my left. I had to lean across the bar to hear him. I don't know that he is quite deaf. I have not known Mr. Judd very long. I met him in Reno. I met him in company with Mr. Beatty. Mr. Beatty introduced me to him. I knew Mr. Beatty very well. That was a few days before our arrest in Elko. Mr. Beatty had been employed by him for some time. Mr. Beatty was a bartender. I have been a bartender. I don't know that Mr. Judd is deaf. I don't recall ever having difficulty in conversation with him. My voice is fairly well modulated, I

think. He said, "I heard you were exonerated." He then told me that Sheley had been exonerated too and that he (24) had gotten a letter. Mr. Sheley was also a defendant in this same case. Then he asked about Bill. I told him I had not heard from him. If I did, I wasn't going to tell him. I knew where he was. He then asked me what was in the letter I got and if I was all through, if I would be called back to testify. He called me a liar and struck me and told me I wasn't through and he wanted to see me outside. When he asked me if I would be called back, he told me I had better not, and I told him I didn't know. I have had no further conversation with him since except here in court. I had another conversation over the phone with him. I did not tell him the whole thing could be straightened out for \$500.00. I do not know of anyone in my family phoning him, or anyone close to me phoning him. I do not know whether any friends did so at my direction. I do not believe so.

### Redirect Examination

I was going to Salt Lake. My wife and I were making a visit to Salt Lake to visit her people. I had been in pretty close contact with Bill Beatty. He was working at Alturas. I would phone occasionally. I knew he was planning to be in Reno, so I wired him when he intended to be here. The plane was grounded on account of weather conditions and we took the train. We planned to continue by train or plane to Salt Lake City. When my wife got a reservation to Salt Lake, I was not able to get a berth, so I planned to take a later train. I knew that Bill was driving. Bill offered me a ride to Salt Lake City and I accepted.

## Recross-Examination

It is not a fact that Mr. Beatty and I intended to open a bar in Elko. I never told Mr. Beatty that. I did not tell Mr. Beatty anything about trying to purchase a gun in Reno. I did not have a gun when I was in Reno. I did not have a gun when I was arrested in Elko. Mr. Beatty, I believe, had two guns.

The conversation at the Streets of Paris was not about \$45. I did not tell Mr. Judd that I purchased this gun that Mr. Beatty was found with in Elko, one of these guns, and that it was my gun but that I wanted Beatty to take the fall for it and admit the possession of it because my being an ex-convict, the possession of a gun in the State of Nevada would be a felony. I do not recall discussing with Mr. Judd the fact that two guns were found in the room occupied by Mr. Beatty and myself at Elko. There were two guns found at that time and place. I do not recall having discussed with Mr. Judd the fact that I had been convicted of a felony.

Mr. Judd came to the place on April 3rd. I was working at the service bar and I was working the whole front bar at the time he came in. The bartender was out eating. It was an off-hour. Mr. Judd was alone. I had a conversation with him. Mrs. Yaggie, the cashier, was present; she was about five or six feet away from us. I knew she could overhear what was said. We discussed it after Mr. Judd left. He asked about the Grand Jury meeting. He asked me when it would come up and I said the 16th; I think he asked me if I would be there and we discussed the business of the serial numbers and Bill's whereabouts and this El Cortez business.



Bonita Yaggie,

called as a witness for the Government, testified in substance as follows:

Direct Examination

My name is Mrs. Bonita Yaggie. On April 3, 1945, I was employed at the Streets of Paris. I was working on that date. I know the defendant Clifford Judd when I see him. He is sitting right over there. (The witness identifies the defendant Judd.) I saw him on April 3rd. I saw him at the Streets of Paris. My position there was cashier behind the bar. Mr. Haliman was working there. He was present when I saw Mr. Judd. They had a conversation. I was present during that conversation. Mr. Judd asked where Bill was; Mr. Haliman said he did not know. Judd insisted that he should know and Mr. Haliman had better tell him. Mr. Haliman said he did not know and would not tell him if he did know. He said if Mr. Haliman did not tell him where Bill was, he would have the bond raised. He said he would have him picked up on the El Cortez robbery. Haliman said he would not have him picked up on the El Cortez robbery because he had not been there and he could prove that he was elsewhere. Judd said Dale had removed the serial numbers from the cases, and Dale said he hadn't anything to do with that and he hadn't any reason for doing so. Judd said he was still going to do it and admitted he did it himself. He said that he was going to say that Dale and Bill must have pulled up by the side of the road (29) some place and removed the serial numbers, and Dale said, "You did it yourself. We had no reason to." Judd



said, "Yes, I know, but I am not going to take the rap on it." Judd said that if Haliman testified against him, he would draw him into it, too. That he would draw him into the case. That is all that I can remember.

I did not hear any conversation about the Grand Jury in Reno. There might have been something, did I did not hear it. All I heard was about finding Bill and where he was. No, there was no further conversation after he made the remark about the serial numbers and if Haliman testified against him, he would draw him into the case. He got up and left.

I saw him after April 3rd. He was down at the Streets of Paris but he did not come to the bar where I was working. Haliman was not working there at that time. Judd was standing at the end of the bar and glanced down and I saw him but when I looked down again, he was gone. That was late in the evening. The next time I saw Mr. Judd was in court today. I did not see the defendant Sheley at any time.

Mr. Mc Donald: If your Honor please, I ask that this conversation be stricken from the record, and that all of the testimony of this witness be stricken from the record as incompetent, irrelevant and immaterial. It has nothing to do with the date of April 3 (April 19) and there is no evidence that there was any threat or intimidation of this man as a witness. I can see no purpose in this conversation from the evidence in this case, and I ask it be stricken.

The Court: The motion will be denied. You may have an exception.

## EXCEPTION NO. 5

## Cross-Examination

It is not unusual for people to come into the Streets of Paris. It opens at 4 and closes at 2. People come in there during those hours. It is not unusual that Mr. Judd would come into the Streets of Paris. I know Mr. Haliman as Haliman, not Halima. He had a conversation with Mr. Judd looking for Mr. Beatty. He had not told me he was under indictment in Nevada. He had not told me that there was a complaint filed against him. I did not know why Mr. Judd was looking for Mr. Beatty. I knew nothing about the trouble Mr. Haliman was in. I paid attention to the conversation. There were three people at the bar—Mr. Haliman, myself and Mr. Judd and it was quiet and naturally I was going to listen, with nothing else to do. I had nothing else to do. It was between 5 and 5:30.

I have known Mr. Haliman for four or five months, maybe longer. He was an employee of the Streets of Paris. I was employed by the Streets of Paris. I met him in connection with my employment. I never saw Mr. Judd before. I would say that he was talking in a normal tone of voice. I do not know whether Mr. Judd has ever seen me before or not. I have never seen him. They did not say what Mr. Haliman was going to testify to. There was some discussion about serial numbers.

This discussion took place on the evening of April 3rd at the Streets of Paris. I worked at the Streets of Paris over a year. I have known Mr. Haliman for four or five months. I am not at the Streets of Paris now. I left there about a month ago. I do not remember for sure when Mr. Haliman left there. I left there before he left.

Marie V. Cole,

called as a witness on behalf of the Government, testified in substance as follows:

I am Mr. Haliman's mother. On April 19th of this year, I was at the Below Decks. That is the place where my son is employed. On that evening, I saw both of the defendants. It was (32) sometime around nine o'clock, probably a little after. I was sitting on a stool in front of the service bar, talking to my son, when I first saw them. I first saw Clifford Judd (pointing to the defendant Judd). He came up and stood right beside me, his arm touching mine on the right. I did not see Mr. Sheley at this time. I first saw Mr. Sheley after Cliff Judd left.

There was a conversation between my son and Mr. Judd in my presence. It occurred shortly after I first saw Mr. Judd. There was no one else present besides Mr. Judd, Dale Haliman and myself. The conversation related to this case in Reno, Nevada. Mr. Judd came up to the bar and stood on my right side and said to my son, "I hear you are exonerated." My son said, "Yes, so I am." He then said, this Mr. Sheley, that he had been exonerated also. He asked my son how he knew he was exonerated, and my son said, "Well, I have a letter, too." He questioned him as to what was in the letter and my son mentioned the fact that he had been exonerated and his bond liberated. He asked him if he had seen Bill and my son said no. I don't remember just what he said then. There was so much conversation. He referred to the letter again and asked him what was in the letter. My son told him what it was. I don't know—I don't remember the words. There was a little talk back and



forth. He then said to my son, "You are a God damn liar," and he jumped up and threw his body against the bar rail and smashed my son on the head with his fist. I grabbed him and pulled him back. I said, "How dare you come in and strike my son?" He said, "Who the hell are you?" I said, "I happen to be Dale's mother." He said, "I don't give a damn if you are." He did not hit me. He doubled up his fist. Judd then left the bar.

Clifford J. Judd,

called in his own behalf, testified in substance as follows:

My name is Clifford J. Judd. I live in Reno at 529 Mill Street. I am manager of the Depot Bar. I have been so engaged since last August. I also have been in the Merchant Marine. I know the witness that testified here this morning. Lester Dale Haliman, or Lester Dale Halima. I knew him under the name of Haliman. I met him in Reno through a boy who was working for us or had been working for us. I don't recall if he was working on that particular day or not. The boy's name is Bill Beatty. This Bill Beatty is William Nelson Beatty, Jr., that has been referred to in the indictment that has been introduced as evidence in this case. Mr. Beatty introduced me to Mr. Haliman. His purpose in introducing me was that they had been friends for quite a while and they were going to try and buy a business in Reno if they could get one. That was when I first met him. They were interested in the saloon business. They wanted me to go out to a place called "The Cedars" to look at it. They said they could get it for a small down payment. It is out on South Virginia Street on the road to Carson



City. I did not go out to look at it. Later he mentioned purchasing a place at Elko, Nevada. (38) He told me he was going to purchase a bar in Elko. He said that they had bought the bar there but they were short of merchandise. By merchandise, I mean whiskey; that is all they handle. Mr. Beatty wanted to borrow some whiskey from me with the understanding that if he couldn't return whiskey of this certain type, he would pay me for the whiskey. I loaned him certain whiskey.

I met Mr. Haliman a few days before. He was with Bill at the time when they helped carry the whiskey out of the basement of my place. There was a discussion about security for this whiskey. He said he had not been working for quite a while but that Bill had \$4500 and it would take all the money they had to pay down on the place, but he took off a square wrist watch that had a large diamond on each corner and said that if I wanted to hold it as security, I could. I told him that Bill's word was good enough; that he had worked for us for several months at both places. When I say "both places", I mean another bar that we own in Alturas.

Afterwards, Mr. Haliman and Mr. Beatty were arrested in Elko, Nevada. I was also arrested. I was charged with certain violations of the Internal Revenue law and conspiracy. I don't recall the date I was arrested. I recall the incident. I was arrested shortly after they were—within a couple of days. I recall meeting Mr. Haliman after he was released from jail in Elko. I met him at the Waldorf Cafe in Reno. I had a conversation with him at that time. He asked me if I thought it would be very serious and I told him at that time I had found

out I had been arrested and my attorney told me as far as I was concerned it didn't mean a great deal. That was our way of transacting business. We did it prior to that and each and every time since. It is routine business in Nevada. Loaning or selling whiskey to other bars. I did not tell him how to testify. (39)

He spoke about some pistols that they found tied up in the window curtains. These pistols were found shortly after their arrest. According to Haliman, they were found in the room occupied by himself and Beatty at Elko. He said that he had done some time in San Quentin and that if you have done a penitentiary sentence in another state, they would call it a felony against him, and that Beatty was willing to say that he bought, that he owned, both pistols. Beatty was willing to testify he bought both pistols, in order to save Haliman who had been previously convicted of a felony, from being arrested for a felony in the State of Nevada. He asked me to testify to the fact that Beatty had two pistols. I told him Beatty went and tried to buy a pistol from a man that was working in the Bonanza Club, but I didn't know where the second pistol was. He had asked me if he could buy a pistol from me and I told him I didn't have a pistol in the establishment and wouldn't be interested in one. We don't have them.

He said that he would call me again that evening if Bill came in. I was anxious to see Bill and if he came in, he would let me know. He would call me just before the train departed. It is just across the street from my place of business. He called me there. I went across the street to see him. We had a conversation at that

time. There was nothing said about his testimony in the case in Nevada. It reverted back to the pistol that he had purchased from a man in San Francisco, who he said was a friend of his and he could go back and have the bill of sale at the time when they found the pistol made out to him. He said if he went back to this man he would have him say that the pistol was sold to Beatty and that the bill of sale was made out in Dale's name and that the reason was that Beatty only (40) had \$100 and that the cost of the pistol was \$45, and the man made it out to Dale, but Dale just paid for it.

He told me that if I wanted to reach him, that I could reach him at the Streets of Paris. If there was anything he could do to get me out of trouble he would, but they haven't worried me then or since, other than the routine business which might happen. He then got on the train and went to San Francisco.

I came to San Francisco afterwards. My purpose in coming to San Francisco was to purchase or buy an interest in the Vanderbilt Bar that is located on Mason Street. I was making arrangements for the purchase of the bar. I saw Mr. Haliman a few days after he left Reno. I don't remember the date. I saw him at the Streets of Paris. I went to the bar about 5:30 in the evening. He was tending bar. There was a girl there. It was the young lady who testified here this morning. She was sitting down in front of the cash register. I bought a drink. I bought one for Mr. Haliman and I think I asked her to have one. The three of us had a drink. He took the money and handed it to her, the cashier, who charges you for the drink, and the bartender gives you back the change. I commented on this.



There was nothing said about the case in Nevada. We had a discussion and he called me away from the cashier to the other end of the bar, down a few feet, where the cashier couldn't be listening I imagine. There was nothing said about the serial numbers of any liquor. I don't recall whether I asked him about testifying against me, I didn't know he was going to testify against me. I thought we were all charged with the same offense, all four of us—I thought that we were all defendants in the same case. I don't recall any discussion with him about (41) the case. We were very friendly at the time. I never heard serial numbers mentioned until now. It was never discussed at all. Nothing more was said. I didn't think that the case was very serious.

I saw him on an occasion after I saw him at the Streets of Paris. I saw him up on Market Street. I don't know the name of the place. I know the location. It is across from and down a ways from the Fox Theater. I don't know the address. It has a bar down in the basement. I went in the bar on that occasion. I didn't know Mr. Haliman was tending bar there at that time. When I went down there, I ran right into him. He was tending bar at that time. There were people lined up on all sides of it. I don't know whether it was the service bar. I just walked up and started talking. I said, "Hello" and he said "Hello" and something else. I didn't hear what he said. He leaned over the bar to ask me a question and I leaned over the bar to meet him, and I laid my weight on my left arm and there was music and I couldn't hear what he was saying. I didn't hear what he was saying. I leaned over the bar. He put up his left hand, just went up easily, and



I put my right hand up and backed away. I don't remember if either one touched. I didn't strike him. I had no intention of striking him. When I put my arm up, I did it as an act. I didn't think and I didn't know that he had anything to be angry about. He kept on talking louder, but I couldn't hear what his words were, so I turned around and walked to the top of the stairs.

When I started down to the place, Mr. Sheley was with me. He came to the top of the stairs and there was a soldier or Navy boy from Reno. It was a soldier and he stopped and had a conversation with him and I just walked down.

On that occasion, I did not ask Mr. Haliman where Beatty was. I just got to say "hello" to him. I just said "hello" and (42) this trouble over the bar ended it. I didn't ask him if he was exonerated. I didn't know it at that time. I didn't tell him Frank Sheley had been exonerated. I didn't know it. Frank Sheley had been charged the same as I. He was charged the same as I and as Haliman and Beatty. I didn't know that any of us had been exonerated. I didn't know whether or not the Grand Jury had met. I didn't know whether or not Mr. Haliman had testified before the Grand Jury. I thought we were all charged equally. I didn't know he had testified against me in Nevada. I had not been back to Nevada since I met him in the Streets of Paris. My attorney told me he would notify me when it was to come up. My attorney had not notified me at the time of this discussion. After I put my hand up, there was no further discussion between Mr. Haliman and myself. There was no conversation between us. I heard him say "hello", that was all. I did not hear the rest of the conversation.

## Cross-Examination

I do not remember the first date I was in San Francisco this year. I have been down a number of times. I remember seeing Mr. Haliman about March 27th. I do not recall the exact date. The conversation took place at the depot in Reno. I came to San Francisco within a week after that conversation. I remember a conversation with Mr. Haliman at which Mrs. Yaggie was present. I don't recall how long I had been in San Francisco (43) before that. I think I came down the week following that that he left and I went in to the Streets of Paris shortly after I came down. I do not recall the exact date. I don't remember whether or not I went in the day I came to San Francisco. I was buying a place here and there was quite a bit of money being invested and I made numerous trips. I don't recall the exact dates that I was here.

I remember the conversation at which Mrs. Yaggie was present and I remember a conversation at the Below Decks. I do not recall whether I went back to Reno between these conversations. I went to the Streets of Paris shortly after I arrived. I don't remember the exact dates. It could have been four or five hours after I came to San Francisco. I may have asked him where Beatty was. I don't remember definitely asking him that question but I know that I should have asked that. A doctor had been calling our place repeatedly that his wife was dying. I do not recall if I asked that particular question at that meeting. I am not sure whether I asked that question at that meeting. The doctor had called a number of times saying that Beatty's wife was dying.

I went to the Streets of Paris early in the evening. I would not know the hour other than they just opened up. I would not know the exact hour—I didn't pay a great deal of attention. I don't know anything about the indictment. I knew we had already been charged. I knew we had been arrested. We had appeared before the Commissioner and posted bond. I don't believe it was a hearing—it lasted just a minute. I don't know what that would be. I knew there was a case in Reno. I knew Beatty also had been arrested. I knew that Sheley also was arrested and I knew that Haliman had been arrested. I knew it all had to do with the same transaction.

When I went to the Streets of Paris, Haliman asked me (44) how serious I thought the case was going to be. I told him I did not think it would amount to a great deal. I don't recall what his answer was. We talked about the case to the amount that I just stated. I didn't ask him if he was going back to Reno; whether or not he would testify was never mentioned. I don't know whether Sheley was in Nevada or California at that particular time. I don't recall definitely asking where Beatty was on that particular trip.

I don't remember the time or place that I met Mr. Sheley. A doctor phoned our place of business about Beatty's wife. Our place of business was the Depot Bar, Reno, Nevada. I didn't know William Nelson Beatty, Jr. had entered a plea in the Reno case. I have never heard of a plea of *nolo contendere*. I didn't know he had been arraigned before the Court any differently than we had. I was not particularly looking for Mr. Beatty. If I had met him, I would have repeated the conversation that the



doctor gave us. I don't recall asking for him at the Streets of Paris. I knew that Haliman and Beatty were good friends. I saw Haliman at the Streets of Paris and I knew the doctor was trying to reach Beatty. I don't recall whether I mentioned it to Haliman or not. It was a later time and it didn't seem so important to me. I had no way of knowing where he was and they said his wife was getting along fine. My wife is very friendly with them. I didn't say I asked for Beatty at the Streets of Paris.

The first thing that I did at the Below Decks was to walk up to the bar. I had never been there before. It was the first time I had been there. I went over to the bar, I saw Haliman. I walked directly to where Haliman was standing. This was the first time I had seen him since I saw him at the Streets of Paris. Sheley remained at the top of the stairs, as I went down. The first thing I said was "Hello" to him. I was standing right against the bar when I said it. I started the conversation by saying "Hello". He said "Hello" back. I have never heard what else he said. I never understood anything further in the entire conversation after he said "Hello"; that was all. I did not stay at the bar very long; just long enough to say "Hello", lean over the bar, turn around and go out. It would be a matter of seconds. I wouldn't recall the amount.

My head was down. I was leaning towards him. His head was almost touching mine. I was directly across the bar from him. My left arm was across the bar. My head was forward. The music was playing and I couldn't hear what he was saying. I wanted to hear what he was saying. He kept his conversation going, his arm right in



my face like that. It would have been his left arm. I was leaning over like this, my right arm back like this and walked out. I leaned over like this and put my right arm up like this. I brought my right arm forward in such (47) a manner that my wrist crossed my face. Then I walked out. I had no further conversation—not another word.

I did not see Mrs. Cole there. I saw her here this morning but it is dark in the place. I don't remember seeing her. I don't remember seeing her at any time. I walked out of the bar.

Sheley had left the top of the stairs and come down. I did not see him leave the top of the stairs, but as I walked up to the bar and turned around, he came in and went behind me on my left and was standing a few feet in front of the bar. I first saw him just as I left. He walked out in front of the bar and had a talk with Dale and I thought he would follow me out. He was a little to my left. I walked past him. I saw him as I walked out of the bar. I did not stop and talk to him. I walked straight up the stairs. I next saw Sheley outside the place.

Nobody told me that Haliman was working at the Below Decks bar. I didn't know he was working there. The last time I saw him he was at the Streets of Paris. It is a coincidence that I met him at the Below Decks.

I didn't put up the money for the bond at Reno. I know the bondsman. I have Beatty's address—the phone. His wife talks to me over the telephone.

I didn't know that the Grand Jury had met in Nevada. Mr. Robinson, my attorney, was going to advise me of that and he had not called me. I had no occasion to

threaten Mr. Haliman. I didn't speak to him except to say, "Hello". On the occasion at the Streets of Paris on April 3d, he seemed very friendly; both of us were very friendly. I had no hard feelings towards him at that time and there were no threats. On the night I saw him at the Waldorf and the Southern Pacific depot in Reno, there were no threats made against him.

Frank Edwin Sheley,

one of the defendants called as a witness, testified in substance as follows:

I reside in Reno, Nevada, at No. 244 East Taylor Street. I have been in trouble in the State of Nevada. I was convicted in the State Court there for receiving (51) stolen property and the case is now on appeal to the Supreme Court of the State of Nevada.

I know the complaining witness in this case, Lester Dale Haliman. I first met him in Reno. I never had any business with him. I saw him on the night of April 19, 1945, at the Below Decks. That evening I had been to the theater. I had met Mr. Judd at about 8:30 or 9 o'clock at the Vanderbilt Bar. He came in and we went to the Fox Theater. I met him at the Vanderbilt Bar and we decided to go to the Fox Theater. There was quite a line so we didn't go in. We went across the street to get a taxicab. I suggested getting a drink; about that time a soldier came along and said he knew me from Reno. We talked a few minutes and then I went downstairs. I suggested getting a drink. I know the name of the bar. It was a bar and I felt thirsty and went in. Mr. Judd preceded me downstairs. I stopped and talked to a soldier that I had

known in Reno. I subsequently went into the bar. I saw Mr. Haliman there. I asked him why he had me arrested and he said he had not had me arrested. I said that that is strange that I am charged with conspiracy for he and a fellow named Beatty having some whiskey, and I told him I had not sold him any whiskey and wondered why he had had me arrested and he said he hadn't. I asked him where Beatty was and he told me he didn't know, to see his attorney. He said as far as me being arrested, I would be exonerated. I asked him how he knew that and he said that he had heard today that he and I were both exonerated. That is the first I knew about it. The Commission in Reno when I was arrested told me that Haliman and Beatty had testified that they bought whiskey from Cliff Judd and I. They didn't buy any whiskey from me. I had none to sell. I never threatened him in any manner. I didn't tell him that Mr. Judd would kill him if he testified against him. I didn't tell him that I would (52) kill him if he testified against me because he had just told me that I had been exonerated.

I had no conversation with the lady who testified here today. I never saw her until today. I don't know her. I didn't see her in that place. There were quite a few people there. She didn't talk to me. I left, met Mr. Judd upstairs and we got into a cab and went back to the hotel. I did not speak to the mother of Mr. Haliman at the Below Decks bar. I didn't ask her where Bill Beatty was. I didn't know where he was at that time. I didn't care where he was at that time.



## Cross-Examination

The Commissioner did not tell me that Beatty and Judd were going to testify when the case came up. He told me that Beatty and Haliman had been arrested in Elko with some whiskey in their possession and claimed that they bought it from Cliff Judd and I. That was the charge.

I asked Haliman where Beatty was and he told me to see his attorney. That is all he said. I have asked Judd where Beatty was. I don't remember when it was—before I went to the Below Decks. He said he didn't know where he was. I didn't go to the Below Decks to find out where Beatty was. I went down to get a drink. I had no idea Haliman was working there. It was a complete surprise when I saw him there. I didn't see Mrs. Cole there. No, I didn't see her; there were quite a few people there. I didn't pay any attention to whether or not there were any women at the bar. I saw him and started talking with him. I wasn't looking for any woman.

I saw Judd leave before I started to talk to Haliman. I didn't say a word to him when he went out. I walked over. I don't remember whether I spoke or not, and asked him why he had me arrested when I saw it was him there. He said he didn't. (53) I was referring to the case in Reno. He said he didn't have me arrested. I said that when I was arrested, I was informed by the Commissioner that he and Beatty had been caught with some whiskey and they claimed that they bought it from me. I was wondering why I was arrested. I don't recall the rest of the conversation.

I didn't say that I wouldn't blame Cliff for killing anybody that would testify against him. I don't know how



long I was there; it was a very short while. I saw he was there and he told me he didn't have me arrested, and Judd had left, so I left. I didn't even have a drink there. I didn't see Judd talking to him. I was at the top of the stairs talking to a soldier when Judd went down. I didn't see him walk down. I went over to the bar to talk to Haliman without stopping. I didn't tell him that there would be plenty more fights before this case came to trial. I didn't tell him this was only the beginning. I had no conversation with any woman at the bar. If Mrs. Cole was there, I didn't see her. I was not interested. We never went back to the Below Decks after that time. I never had any conversation with Haliman after that time. I never saw him. I never found out where Beatty was. I did not make any more inquiries. I was not interested. I had been exonerated (Tr. of Record, pp. 13-69).

At the conclusion of the testimony, the cause was argued by counsel and the Court delivered its charge to the jury, which thereafter returned a verdict finding the defendant Sheley not guilty and finding appellant guilty. Sentence, as heretofore noted, was thereupon passed upon appellant of imprisonment for six months and to pay a fine in the sum of \$500 (Tr. p. 8).

**SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON:**

Assignment No. I (Tr. p. 10)

Assignment No. II (Tr. p. 11)

Assignment No. III (Tr. p. 11)

Assignment No. IV (Tr. p. 11)

Assignment No. V (Tr. p. 11)

Not included in the assignments of error, but made one of the grounds of appeal (Tr. p. 9), and which we therefore submit is properly before the Court, is the contention that the District Court erred in not granting the motion of the defendant for arrest of judgment. This assignment places squarely before the Court the legal sufficiency of the information to charge any crime or offense against the United States.

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**ARGUMENT**

**THE CONVICTION OF APPELLANT IS A NULLITY, BECAUSE THE INFORMATION DOES NOT STATE SUFFICIENT FACTS TO CHARGE APPELLANT WITH ANY CRIME AGAINST THE UNITED STATES** (Grounds of Appeal No. IV).

As heretofore stated, the information in the case at bar is based upon Section 135 of the Criminal Code (U.S.C.A. Title 18, section 241) which reads as follows:

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any Court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as

such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1000 or imprisoned not more than one year, or both."

In discussing the sufficiency of this information, we refrain from considering the decisions which deal with the power of the courts to punish interference with their witnesses, officers or process, as a contempt. The section is a penal statute and must be strictly construed. An information based upon it is subject to the rule of pleading which prevails in all prosecutions for crime, to-wit: That the indictment must be sufficiently specific and certain to inform the defendant of the nature and cause of the accusation against him to the end that he may prepare his defense, and plead a conviction or an acquittal as a bar to a subsequent prosecution for the same offense.

*United States v. Bopp*, 230 Fed. 731;

*United States v. Cruikshank*, 92 U.S. 542.

Furthermore, the rule is equally well settled that a defective indictment cannot be aided by any inference or surmise, because all intendments are against the pleader, and no inference or surmise can take the place of a necessary allegation in the indictment.

*Pettibone v. United States*, 148 U.S. 197; 37 L. Ed. 419;

*United States v. Louisville, etc. Co.*, 165 Fed. 936.

Tested by this well settled principle, the information in the case at bar is fatally defective for the following reasons *inter alia*:

There is no allegation in the information to show that the United States District Court for the District of Nevada had jurisdiction of the case of *United States v. Judd and Beatty* mentioned in the information. If the Court lacked jurisdiction, no crime could be committed under this statute. To state the matter otherwise, if the case mentioned in the information were one over which the Federal Court in Nevada had no jurisdiction, a witness would be under no obligation to obey a subpoena to appear upon the trial of the case; would not be in contempt of court for violating a subpoena; and a third party would be guilty neither of contempt of court nor of a violation of the statute for either inducing or intimidating a witness to prevent his attendance.

That this is the law is settled beyond all cavil by the federal decisions, including two on this circuit.

U.S.C.A., Title 18, section 241, is founded upon Section 5404 of the Revised Statutes. In *U. S. v. Armstrong*, 59 Fed. 568, a prosecution under that section, Judge Ross, for many years a judge of this court, clearly demonstrates that an indictment as indefinite and uncertain as that in the case at bar is wholly insufficient to support a conviction. He quotes the following language from *United States v. Carll*, 105 U.S. 612:

“In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, by themselves, fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished.”

After quoting the language of the statute and the indictment under consideration, he adds:



“It is essential to the sufficiency of an indictment that the acts charged be, if proven, sufficient to support a conviction of the offense charged.”

In that behalf he cites *United States v. Cruikshank*, 92 U.S. 542, in which it is stated that the object of an indictment is:

“First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.”

In *United States v. Collins*, 79 Fed. 65, also decided on this circuit, the defendant was charged with violation of Section 5399 of the Revised Statutes, prohibiting the impeding of the due course of justice, which is one of the parent statutes of Section 241 of Title 18, U.S.C.A. The indictment alleged that a certain United States commissioner had issued a warrant upon which one Terry had been arrested, and a date fixed for conducting his examination; that the defendant was served with a subpoena which he corruptly refused to obey, and that he also corruptly refused to comply with an order of the Commissioner to deliver a certain letter in his possession to the United States Marshal. Judge Wellborn, in a very learned opinion, shows that the Commissioner had no jurisdiction to issue the original warrant for arrest, the affidavit being solely on information and belief, and had, therefore, no jurisdiction whatsoever over the proceeding. Accordingly,

the Court held that he lacked jurisdiction to issue the subpoena, and a demurrer to the indictment was sustained.

The information on file in this cause is utterly lacking in the necessary averments showing jurisdiction of the District Court for the District of Nevada, in the case of *United States v. Judd*, the cause in which it is alleged that Haliman was a witness. Nothing can be ascertained from the information as to the nature of the cause. The jurisdiction of the United States district courts is prescribed by the Constitution of the United States and by the statutes. Section 2 of Article III of the Constitution of the United States provides:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States, —between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

The statutory provisions relating to the jurisdiction of district courts are set forth in U.S.C.A., Title 28, section 27. This section sets forth 28 classes of cases in which original jurisdiction is vested in the district courts. Among these, for example, are suits between citizens of different states, “of all crimes and offenses cognizable under the au-

thority of the United States'', and all cases for the enforcement of any order of the Interstate Commerce Commission. There is no statement in the information that the case of *United States v. Judd* was a case falling within any provision of the statute. For aught that appears, it may have been a case exclusively within the jurisdiction of the State court, or a case over which *no court* had any jurisdiction.

The courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred on them.

*Chicot County Drainage District v. Baxter St. Bank*,

308, U. S. 371, 66 S.Ct. 317, 84 L.Ed. 329;

*Bors v. Preston*, 111 U. S. 252, 28 L.Ed. 885;

*United States v. Johnson*, 123 Fed. (2d) 111;

*McQuillen v. National Cash Register Co.*, 112 Fed. (2d) 877;

*in re Hollins*, 229 Fed. 349.

The criminal jurisdiction of the Federal courts is only such as is expressly conferred on them.

*Peters v. United States*, 94 Fed. 127.

A consent of the parties will not confer jurisdiction upon a Federal court where none exists.

*Iowa Lillooet Mining Co. v. Bliss*, 144 Fed. 446;

*Parkersburg First National Bank v. Prager*, 91 Fed. 689.

Thus the naked allegation that the action was a proceeding before the District Court for the District of Nevada, is an utterly insufficient statement of the jurisdiction, because it is a matter of judicial, and even common, knowledge, that many proceedings are brought in the Federal courts by litigants who have mistaken their forum.



For the utter lack of any proper averment of jurisdiction, of the court in which it is alleged that the party threatened was a witness, it is submitted that the information is void, and the conviction of appellant thereon a deprivation of due process of law.

For still another reason apparent upon the face of the record, the information in the instant case is void. It is verified by the oath of one W. G. Whitfield, who states that he is an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue, "that he has read the foregoing information, and that the facts therein stated are true of his own knowledge". (Tr. p. 3) The evidence produced at the trial shows that by no possibility could Whitfield have had any personal knowledge respecting the guilt or innocence of either of the defendants or of any other fact alleged in the information. No pretense is made that he was present at the time of the making of any of the alleged threats. His alleged knowledge of them was the veriest hearsay. The witness Haliman relates that the threats against him were made by the appellant in a bar-room in San Francisco; that the only persons within ear-shot at that time were the appellant, the witness and the witness' mother. On another occasion, the only persons present were the appellant, the witness Haliman, and the witness Bonita Yaggie. (Tr. pp. 20-23) It is of no avail that the affidavit filed in support of the information is couched in positive terms rather than on "information and belief". The requirements of the Constitution that no warrant shall issue except on probable cause, supported by oath or affirmation, cannot be circumvented by duplicity.

The instant case falls squarely within the rule of *United*



*States v. Collins*, supra, and *Johnston v. United States*, 87 Fed. 187.

In the latter case, the Circuit Court of Appeals of the 5th Circuit, says in part:

“The record shows that the plaintiff in error first demurred to the indictment on the ground that the information was not based upon an affidavit showing facts within the personal knowledge of the affiant.

“This demurrer being overruled, Johnston filed a plea in abatement, the grounds of which do not appear in the record. Following the plea in abatement, Johnston appears to have demurred generally to the information. The Bill of Exceptions found in the record purports to give all the testimony adduced on the trial of the case. The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, or even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that ‘there is probable cause to believe that the said offense has been committed by P. T. Johnston’. However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.”

Holding that the demurrer should have been sustained, reversing the conviction, and remanding the cause with directions to the lower court to quash the information, the Circuit Court of Appeals cites two earlier cases:

*United States v. Tureaud*, 20 Fed. 621;

*United States v. Polite*, 35 Fed. 59.

In the last of these cases, it was held that "informations must be based on affidavits which show probable cause arising from facts *within the knowledge of the parties making them*, and that mere belief is not sufficient.

THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTION OF SAID DEFENDANT THE TESTIMONY OF THE WITNESS DALE HALIMAN CONCERNING A CONVERSATION, TAKING PLACE ON APRIL 4, 1945, IN THE STREETS OF PARIS CAFE IN THE CITY AND COUNTY OF SAN FRANCISCO (Assignment No. II).

THE COURT ERRED IN ADMITTING IN EVIDENCE TESTIMONY AS TO CONVERSATIONS TAKING PLACE IN RENO, NEVADA, ON OR ABOUT THE 27TH DAY OF MARCH, 1945 (Assignment No. III).

THE COURT ERRED IN REFUSING TO STRIKE FROM THE RECORD ALL OF THE TESTIMONY OF THE WITNESS MRS. BONITA YAGGIE (Assignment No. IV).

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE DEFENDANT TO TESTIMONY OF THE WITNESS MRS. MARIE V. COLE AS TO TESTIMONY CONCERNING THREATS MADE TO SAID WITNESS (Assignment No. V).

These assignments are considered together, because a like error was committed in each instance, to-wit: The admission in evidence of an alleged offense other than the one charged in the information. The law, with certain exceptions, of which this case is not one, prohibits the introduction in evidence in a criminal trial of other offenses than that alleged in the indictment or information. The rule and the exceptions thereto are exhaustively discussed in the classic case of

*People v. Molineux*, 168 N.Y. 264; 61 N.E. 286.

Very much in point is the brilliant opinion of Justice Henshaw, in *People v. Glass*, 158 Cal. 650, 112 Pac. 281.

In that case, the defendant, a public utility official, was convicted of offering a bribe to a member of the Board of Supervisors of the City and County of San Francisco to refuse to grant a franchise to a rival company. Upon the trial, a mass of evidence was introduced tending to show efforts made by the said company to prevent the same rival from acquiring a franchise in the City of Oakland. Reversing the conviction for the commission of this error, it is stated in the opinion:

“It should seem unnecessary to state—but apparently it is not—that a multitude of acts, facts, and happenings upon which men base their opinions and judgments of their fellowmen do not come within the definition and scope of *evidence* as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that ‘it was to be expected’. Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced within the



charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps undue, tenderness goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors, if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury."

Other often-quoted decisions stating that the general rule is against receiving evidence of another offense are, among many:

*Coleman v. People*, 55 N.Y. 81;

*People v. Sharp*, 107 N.Y. 427; 14 N.E. 319;

*People v. Shea*, 147 N.Y. 78; 41 N.E. 505;

*Commonwealth v. Jackson*, 132 Mass. 16;

*Shaffner v. Commonwealth*, 72 Pa. 60;

*People v. Lane*, 100 Cal. 379;

*People v. Cook*, 148 Cal. 334;

*Boyd v. U.S.*, 142 U.S. 450; 12 S.Ct. 292; 35 L.Ed. 1077;

*Fish v. U.S.*, 215 Fed. 544.



**CONCLUSION**

For the errors above assigned, it is submitted that the judgment should be reversed and the cause remanded to the District Court with directions to quash the information and to discharge the appellant without day.

Dated: San Francisco, California, February 20, 1946.

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No. 11,117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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BRIEF FOR APPELLEE.

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FILED

MAY 22 1941

PAUL P. O'BRIEN,  
CLERK





## Subject Index

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No. 11,117

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CLIFFORD J. JUDD,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF FOR APPELLEE.

---

The appellant, Clifford J. Judd, and one Frank Edwin Sheley, were tried before a jury upon an information charging a violation of Section 241 of Title 18 U.S.C.A., Criminal Code, Section 135, "Attempting to influence witness, juror, or officer". Frank Edwin Sheley was found "not guilty". The appellant was found guilty and was sentenced to imprisonment for a period of six months and to pay a fine in the sum of \$500.00.

This is an appeal from the judgment and order so made by the United States District Court for the Southern Division of the Northern District of California.

**JURISDICTIONAL STATEMENT.**

Jurisdiction is conferred upon the trial Court by Title 28 U.S.C.A., Section 41(2), and upon this Court by Title 28 U.S.C.A., Section 225.

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**APPELLANT'S ASSIGNMENT OF ERRORS.****I.**

That the Court erred in admitting in evidence over the defendant's objection the certified copy of indictment and the record of the cause in action No. 11,171, *United States of America, plaintiff v. Clifford J. Judd, et al.*, pending in the United States District Court for the District of Nevada.

**II.**

That the Court erred in admitting in evidence over the objection of said defendant the testimony of the witness Dale Haliman concerning a conversation, taking place on April 4, 1945, in the Streets of Paris Cafe in the City and County of San Francisco.

**III.**

That the Court erred in admitting in evidence testimony as to conversations taking place in Reno, Nevada, on or about the 27th day of March, 1945.

**IV.**

That the Court erred in refusing to strike from the record all of the testimony of the witness Mrs. Bonita Yaggie.



## V.

That the Court erred in overruling the objection of the defendant to testimony of the witness Mrs. Marie V. Cole as to testimony concerning threats made to said witness.

---

### STATEMENT OF FACTS.

The facts are substantially those set forth in Opening Brief for Appellant, pp. 3-33, inclusive. To amplify that record, we set forth here the indictment charging the appellant and one William Nelson Beatty, Jr., with a violation of Section 88 of Title 18 U.S.C.A., which indictment is mentioned in the information in the case now on appeal before this Court (Tr. p. 15):

“In the District Court of the United States of America, in and for the District of Nevada.”

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

WILLIAM NELSON BEATTY, JR., and  
CLIFFORD J. JUDD,

### INDICTMENT FOR VIOLATION

Sec. 88, T. 18, U.S.C.

United States of America,  
District of Nevada—ss.

“Of the February, 1945, Term of the District Court of the United States of America, in and for the District of Nevada;

“The grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

“That William Nelson Beatty, Jr., and Clifford J. Judd, defendants named above, whose other or true names are to these Grand Jurors unknown, on or about March 15, 1945, and during all the times hereinafter mentioned, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly and feloniously, combine, conspire, confederate and agree together and with each other, to commit offenses against the United States by means and in the manner following, that is to say:

“That at all times herein mentioned, defendant Clifford J. Judd, should keep and maintain at the Depot Bar on Commercial Row in Reno, Nevada, a quantity and supply of intoxicating liquors, to-wit: whiskey; that said Clifford J. Judd should, from time to time, sell, or consign, and deliver quantities of such intoxicating liquor to defendant, William Nelson Beatty, Jr., for transportation from Reno, Nevada, to Salt Lake City, Utah, with the intention in each of said defendants, then and there, that said liquor should be sold and used in the State of Utah in violation of the laws of the State of Utah; that defendant, William Nelson Beatty, Jr., should receive delivery of said liquor from Clifford J. Judd, and should transport it from Reno, Nevada, to Salt Lake City, Utah, for sale and use in the State of Utah, in violation of the laws of said

State; that the liquor so sold or consigned and delivered by Clifford J. Judd to William Nelson Beatty, Jr., and received by the latter, should be sold and disposed of by William Nelson Beatty, Jr., to a person or persons to these Grand Jurors unknown, at prices in excess of the ceiling prices fixed and established for such liquor under and pursuant to Emergency Price Control Act of 1942, as amended, and the Rules and Regulations promulgated pursuant thereto.

“And the Grand Jurors aforesaid, do further present and charge that said defendants having formed the conspiracy, confederation and agreement to execute and do the unlawful acts and things hereinabove set forth, and in pursuance of such unlawful and felonious conspiracy, confederation and agreement, and to effect the objects and purposes thereof, said defendants did commit and perform, among others, the following overt acts:

“(1) On or about March 15, 1945, said defendants, Clifford J. Judd and William Nelson Beatty, Jr., conferred together regarding the objects and purposes and execution of such conspiracy, at the Depot Bar in Reno, Nevada.

“(2) On or about March 16, 1945, defendant, William Nelson Beatty, Jr., purchased from the Matthews Motor Company, in Reno, Nevada, a 1940 Oldsmobile Sedan, for use in the transportation of the liquor.

“(3) On or about March 18, 1945, Clifford J. Judd and William Nelson Beatty, Jr., removed fourteen (14) cases of pints and four (4) cases of fifths, of Old Token Blended Whiskey, 86



proof, from the basement of the Depot Bar in Reno, Nevada, and loaded said whiskey into the said Oldsmobile Sedan automobile.

“(4) On or about March 18, 1945, William Nelson Beatty, Jr., drove said Oldsmobile Sedan automobile, containing said eighteen (18) cases of Old Token Whiskey, from Reno, Nevada, to Elko, Nevada, enroute to Salt Lake City, Utah.

“(5) On or about March 19, 1945, at Reno, Nevada, defendant, William Nelson Beatty, Jr., sent a telegraphic message by Western Union to defendant, Clifford J. Judd, as follows: ‘Blown head gasket at Stockmen’s Hotel leave tomorrow p.m.’

“Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ MILES N. PIKE

United States Attorney

“A True Bill:

/s/ HARRY GRAY,  
Foreman.”

The case in which this indictment was returned shall herein be called the “Nevada case”.



## ARGUMENT.

## I.

THE INFORMATION STATES SUFFICIENT FACTS TO CHARGE APPELLANT WITH A CRIME AGAINST THE UNITED STATES: NO ALLEGATION THAT THE CASE REFERRED TO THEREIN (THE NEVADA CASE) WAS WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT OF NEVADA WAS REQUIRED.

In his Opening Brief (p. 36) appellant argues:

“There is no allegation in the information to show that the United States District Court for the District of Nevada had jurisdiction of the case of United States v. Judd and Beatty mentioned in the information. If the Court lacked jurisdiction, no crime could be committed under this statute.”

However, no assertion that the Nevada Court had jurisdiction over the Nevada case was required. This very point was raised and disposed of in a case arising under the same statute, Section 241, 18 U.S.C.A., Criminal Code Section 135, *Nye v. United States* (C. C.A. 4), 137 F. (2d) 73, cert. den. 64 S. Ct. 62, 320 U.S. 755. There the Court stated at page 76:

“The points that the indictment is insufficient in not charging that the court had jurisdiction of the case in which the attempt was made to obstruct justice, and in not charging that the letters and affidavits used were false to the knowledge of defendant, are so manifestly lacking in merit as not to warrant discussion. This was a prosecution for obstructing justice, not a jurisdictional inquiry nor a prosecution for false pretense. That there was no need to allege specifically the jurisdiction of the court over the pro-

ceedings in which it was sought to obstruct justice, see *Davey v. United States*, 7 Cir., 208 F. 237.”

In the case of *Davey v. United States*, 208 F. 237, the Court at page 240 considers the matter of alleging the jurisdiction of the case interfered with in the following language:

“That point is made that the indictments are insufficient in not showing that the court had jurisdiction over the cause in which McMillen was to be a witness, and that McMillen was not legally designated as a witness. In counts 5 and 6 it is stated that McMillen was a witness ‘in a case then and there pending in the District Court of the United States for the District of Indiana, which said cause was then and there entitled “The United States v. Richard E. Walker, No. 7,085, at the May term of said court,” ’ and that he ‘was then and there a material and important witness for the United States in the case aforesaid.’ This we deem sufficient.”

The reason for this rule is well stated in the *Nye* case, *supra*, at page 77:

“Whether the suit was or was not one of which the Court had jurisdiction, there was certainly power in the court to determine the question of jurisdiction \* \* \*. The interests of justice require that questions of jurisdiction as well as other questions be determined in an orderly way; and one who corruptly obstructs or impedes the processes of justice may not escape the consequences of his conduct by showing that the court should have declined jurisdiction of the action with which he corruptly interfered.”

## II.

THE INFORMATION IS SUFFICIENT TO SUPPORT A CONVICTION: AN INFORMATION NEED NOT BE VERIFIED.

The appellant in his Opening Brief (p. 40) advances the following argument regarding the sufficiency of the information:

“For still another reason apparent upon the face of the record, the information in the instant case is void. It is verified by the oath of one W. G. Whitfield, who states that he is an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue, ‘that he has read the foregoing information, and that the facts therein stated are true of his own knowledge’. (Tr. p. 3.) The evidence produced at the trial shows that by no possibility could Whitfield have had any personal knowledge respecting the guilt or innocence of either of the defendants or of any other fact alleged in the information. No pretense is made that he was present at the time of the making of any of the alleged threats.”

The rule is well settled that to be valid an information need not be verified. The question of Whitfield’s knowledge of the facts at the time of his verification is thus remote beyond all calculation.

*Husar v. United States* (C.C.A. 9), 26 F. (2d)

847; cert. den. 49 S. Ct. 27, 278 U.S. 625;

*Merrill v. United States* (C.C.A. 9), 6 F. (2d)

120;

*Jordan v. United States* (C.C.A. 9), 299 F. 298.

The record is void of any showing that a warrant was issued on the basis of the information. *Brown v. United States*, 257 F. 203, cert. den. 40 S. Ct. 119, 251



U.S. 554. Nor was any objection made at any stage of the proceedings prior to this to the validity of the verification. *Jordan v. United States* (C.C.A. 9), 299 F. 298.

The verification by its wording contains no hint that it is limited to "information and belief". In view of the decisive doctrine of the cases herein cited, the appellee considers it superfluous to argue further in support of the verification in the matter before the Court.

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### III.

THE CONVERSATIONS OF THE APPELLANT PRIOR TO THE ATTEMPT TO INTIMIDATE WERE ADMISSIBLE TO SHOW HIS KNOWLEDGE OF THE PENDENCY OF THE NEVADA CASE AND HALIMAN'S ROLE AS A WITNESS.

The appellant at page 42 of his Opening Brief challenges the admissibility of conversations engaged in by the appellant:

"The Court erred in admitting in evidence over the objection of said defendant the testimony of the witness Dale Haliman concerning a conversation, taking place on April 4, 1945, in the Streets of Paris Cafe in the City and County of San Francisco (Assignment No. II).

"The Court erred in admitting in evidence testimony as to conversations taking place in Reno, Nevada, on or about the 27th day of March, 1945 (Assignment No. III).

"The Court erred in refusing to strike from the record all of the testimony of the witness Mrs. Bonita Yaggie (Assignment No. IV).



“The Court erred in overruling the objection of the defendant to testimony of the witness Mrs. Marie V. Cole as to testimony concerning threats made to said witness (Assignment No. V).

“These assignments are considered together, because a like error was committed in each instance to-wit: The admission in evidence of an alleged offense other than the one charged in the information.”

The general rule excluding evidence tending to show that the accused committed other offenses is subject to a number of exceptions. The only offense referred to in the record of this case, aside from the one stated in the information, was the Nevada case. The appellant's knowledge of the pendency of that case, and his knowledge that Haliman, the victim of his assault, was to be a witness in that case, were necessary elements of proof. Indeed, proof that a Nevada case was in fact pending was essential. The appellant seems to be arguing that no case under Section 241, Title 18 U.S.C.A., can ever be prosecuted where the pending proceeding charges the intimidator of a crime. For it would always be true that a conviction would be necessarily predicated upon this same “error”.

Authorities that proof tending to show another crime may be admitted where the knowledge of the accused regarding a constituent element of the offense in question is so proved are numerous.

*Fall v. United States*, 49 F. (2d) 506, cert. den.

51 S. Ct. 657, 283 U.S. 867;

*Whitaker v. United States*, 72 F. (2d) 739;

*Austin v. United States* (C.C.A. 9), 4 F. (2d) 774;  
*Buhler v. United States* (C.C.A. 9), 33 F. (2d) 32;  
*Miller v. United States* (C.C.A. 9), 47 F. (2d) 120;  
*Gianotos v. United States* (C.C.A. 9), 104 F. (2d) 929.

Evidence tending to establish the guilt of the accused, in this case his knowledge of the Nevada case and Haliman's role therein, is not incompetent because it may show him guilty of another offense.

*Miller v. United States* (C.C.A. 9), 47 F. (2d) 120;  
*Johnston v. United States* (C.C.A. 9), 22 F. (2d) 1, cert. den. 48 S. Ct. 421, 276 U.S. 637.

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### CONCLUSION.

It is respectfully submitted that the information is sufficient to sustain the conviction, that the lower Court committed no error, and that the judgment should be affirmed.

Dated, San Francisco, California,  
 March 27, 1946.

FRANK J. HENNESSY,  
 United States Attorney,

REYNOLD H. COLVIN,  
 Assistant United States Attorney,

*Attorneys for Appellee.*

No. 11,117

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S REPLY BRIEF

---

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FILED  
PAUL P. GIBSEN,  
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No. 11,117

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S REPLY BRIEF

---

In the opening brief of appellant, three points are relied upon for a reversal of the judgment:

(1) That the information does not state sufficient facts to charge appellant with any crime against the United States, for the reason *inter alia* that it does not allege even in general terms that the United States District Court for the District of Nevada had any jurisdiction of the case of United States v. Clifford J. Judd and William N. Beatty, a witness, in which case it is charged that appellant did endeavor to influence, intimidate and impede by force and threats.

(2) That the court had no jurisdiction to try appellant on the information because the same was verified by one who admittedly had no personal knowledge of the facts therein contained, and was based, therefore, on the veriest hearsay.

(3) That the district court committed error in admitting incompetent evidence to which appellant duly excepted.

The brief of the government has just been served upon us this 28th day of March, 1946. The cause is set for argument on the morning of April 2, and all briefs should be on file by that time. The time usually allowed by the rules for the filing of a reply brief has been cut in two, and it is necessary, therefore, that this answer to the brief of appellee be written at a sitting, if it is to be printed, served and filed by the time set for the argument. We shall do our utmost to thoroughly answer the contentions of the appellee in the scant time that we have for that purpose.

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## I.

### **THE INFORMATION IS INVALID AND THE CONVICTION OF APPELLANT THEREON IS VOID FOR LACK OF THE NECESSARY JURISDICTIONAL AVERMENTS**

We doubt if any lawyer would have the temerity to contend that appellant could have been legally convicted of endeavoring to intimidate a witness without proof that an action was pending over which the court, where the attendance of the witness was required, had jurisdiction, and the United States Attorney recognized the necessity of such proof by offering in evidence a certified copy of the indictment in the case of *United States v. Judd and Beatty*

at the very outset of the trial. It is contended, however, in the brief for appellee, that it was not necessary to plead in the Information the facts on which the jurisdiction of the court for the District of Nevada was based, or even to aver generally that the case was one within the jurisdiction of that court. Two cases are cited by learned counsel for the government as upholding the sufficiency of such a pleading. In *Davey v. United States*, 208 Fed. 237, the question is not discussed at all, the court merely using the language quoted by counsel,—language which is but the *ipse dixit* of the court, without any reasoning or citation of authorities. The case of *Nye v. United States*, 137 Fed.(2d) 73, was based on facts dissimilar to those in the case at bar, as appears from the following statement contained in the opinion of the court:

“This is an appeal from a conviction and sentence under a count of an indictment charging wilful and corrupt obstruction of justice in violation of 18 U.S. C.A. section 135. Appellant is one R. H. Nye, who was charged with contempt of court because of the **same obstruction of justice** in a case which was before this court in *Nye v. United States*, 113 Fed. (2d) 1006, and before the Supreme Court in *Nye v. United States*, 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 872. The Supreme Court held that the conduct of Nye and one Mayers, who was charged with him, could not be punished as a contempt of court under 28 U.S.C.A. section 385, but that if the facts found in that case were taken to be true, it was ‘highly reprehensible’ and ‘of a kind which corrupts the judicial process and impedes the administration of justice.’ Following this, Nye and Mayers were indicted under a bill of indictment containing two counts, the first charging con-

spiracy to obstruct justice and the second charging the obstruction of justice.”

It will thus be observed that the indictment in the Nye case was based upon matters and things that had occurred in the **same court** in a proceeding there pending and which had been before the Supreme Court, whose opinion was a matter of judicial knowledge. More, the district court could likewise take judicial notice that it had alleged obstruction of justice occurred. But it is settled beyond all cavil that courts do not take judicial notice of proceedings in **other** courts. A federal district court will take judicial notice of the affirmance of its own judgment by the Supreme Court of the United States (*In re Durrant*, 84 Fed. 314) as a matter of general notoriety, but otherwise federal courts do not take judicial notice of the records of **other federal courts**.

*In re Manderson*, 51 Fed. 501;

*Fitzgerald v. Evans*, 49 Fed. 426.

Moreover, both of the decisions cited by counsel for the government are from other circuits, and are clearly not binding on this court. As is well said in *Mast v. Stover Mfg. Co.*, 177 U.S. 485, 20 S.Ct. 708, 44 L.Ed. 856:

“Comity is not a rule of law, but of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. **But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent**



increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares not how a case shall be decided, but how it **may** with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, **to decide them right**. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. **It demands of no one that he shall abdicate his individual judgment**, but only that deference shall be paid to the judgments of other coordinate tribunals."

See to the same effect *Norwich Union Fire Ins. Co. v. Stanton*, 191 Fed. 813.

This court, we submit, should not follow statements in the opinions of other circuit courts of appeals which advance no reason in either principle or authority for their conclusions, and which are in irreconcilable conflict with the overwhelming, and, indeed, well nigh unanimous, authority of the federal decisions to the effect that the federal courts are of limited jurisdiction, that the presumption is always against their jurisdiction, and that the facts necessary to establish that jurisdiction must be fully and distinctly alleged in all proceedings in which it is involved.

This brings us to the statement and discussion of those well settled principles.

(a) **EVERY PRESUMPTION IS AGAINST THE JURISDICTION OF A FEDERAL COURT.**

In the absence of any averment of facts sufficient to show that the federal district court in Nevada had jurisdiction of the cause alleged to have been pending before it, the presumption is that it **did not** have jurisdiction.

“The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed.”

*Chicot Drainage District v. Barber State Bank*, 308 U.S. 371, 60 S.Ct. 317.

“Lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties.”

*United States v. Griffin*, 303 U.S. 226, 82 L.Ed. 764.

In *Ex parte Smith*, 4 Otto 455, 24 L.Ed. 165, Chief Justice Waite says:

“The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record in all suits prosecuted before them. To this rule there are *no exceptions*. \* \* \* *There are no presumptions in favor of the jurisdiction of the courts of the United States.*”

The rule, which is absolute, and which is pronounced by the decisions without dissent, is that the presumption is **against** the jurisdiction of a federal court in any particular case, **throughout** the case, and at **every** stage thereof, unless and until the contrary **affirmatively** appears.

*Norton v. Larney*, 266 U.S. 511, 45 S.Ct. 145, 69 L.Ed. 413;

*Young v. Main*, 72 Fed.(2d) 640;

*Davidson v. Rafferty*, 34 Fed.(2d) 700;  
*Ward v. Morrow*, 15 Fed.(2d) 660;  
*New York Life Ins. Co. v. Kaufman*, 78 Fed.(2d) 398;  
*Town of Lantana v. Hopper*, 102 Fed.(2d) 108;  
*Bors v. Preston*, 111 U.S. 252, 4 S.Ct. 407, 28 L.Ed. 419;  
*United States v. Green*, 107 Fed.(2d) 19;  
*Hurley v. Wells-Newton*, 49 Fed.(2d) 914;  
*Highway Construction Co. v. McClelland*, 14 Fed. (2d) 406;  
*Danks v. Gordon*, 272 Fed. 821;  
*Thomas v. Ohio State University*, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160;  
*King Iron Bridge Co. v. Otoe County*, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623;  
*Continental Ins. Co. v. Rhoads*, 119 U.S. 237, 7 S.Ct. 193, 30 L.Ed. 380.

A long line of cases in the Federal Supplement adheres to this rule, but we believe that nothing can be added by citing the decisions of *nisi prius* courts.

**(b) IN ALL CASES THE JURISDICTIONAL FACTS MUST BE DISTINCTLY ALLEGED.**

Since the federal courts are courts of limited jurisdiction, their jurisdiction will not be presumed, but must appear in the record affirmatively and positively, and cannot be inferred argumentatively. Jurisdiction, or the facts upon which, in legal intendment, it rests, must be distinctly and positively alleged in the pleadings.

54 *Am. Jur.* 767, citing in the footnotes at least two score cases, including many heretofore cited in this brief.

Nowhere is the rule better stated than by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 8 L.Ed. 885:

“The decisions of this court require that the averment of jurisdiction shall be positive, that the declaration shall *state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.*”

So strong is the presumption against the jurisdiction of the federal courts that it is settled by the highest court in the land that, even where the pleadings sufficiently allege jurisdiction, the burden of establishing the jurisdiction is upon the plaintiff throughout the case, and where the federal jurisdiction invoked by the plaintiff is challenged in any appropriate manner, **the burden is upon him to sustain the jurisdiction.**

*Thomson v. Gaskill*, 315 U.S. 442, 62 S.Ct. 68, 86 L.Ed. 951;

*McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135.

In the case last cited Chief Justice Hughes uses the following language:

“The Act of 1875 prescribes a uniform rule and there should be a consistent practice in dealing with jurisdictional questions. We think that the terms and implications of the Act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined, and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his



favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged, the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegation by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

We submit that, in view of this vast array of authorities, it must be presumed that the United States District Court for the District of Nevada **did not** have jurisdiction of the case of *United States v. Judd and Beatty*, and that the Information, containing, as it does, no jurisdictional

averments, does not charge an offense against the United States.

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## II.

### THE INFORMATION IS VOID FOR LACK OF A VERIFICATION BY ONE HAVING KNOWLEDGE OF THE FACTS

This matter we discussed at length in the opening brief for appellant, citing *United States v. Collins*, 79 Fed. 65, decided on this circuit, and *Johnston v. United States*, 87 Fed. 187, decided by the Circuit Court of Appeals on the Fifth Circuit.

In the case of

*Ex parte Spears*, 88 Cal. 640,

the same question is dealt with by Judge De Haven, of the Supreme Court of the State of California, afterward a United States District Judge for the Northern District of California, in considering the sufficiency of an affidavit in an extradition case. It is there said:

“It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish, that any man may be deprived of his liberty and removed to another state upon such an accusation.”

The learned justice quotes with approval the language of the Supreme Court of Michigan in *Swart v. Kimball*, 43 Mich. 451:

“Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law; the most improbable stories may be believed of any one, and the man most

free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt."

It is argued by the United States Attorney that the verification of the Information in the case at bar is not within the rule of the foregoing decisions because the investigator states that the facts are true of his own knowledge. We dealt with this contention in the appellant's opening brief, by showing that the testimony in the case reveals the fact that Whitfield was not present at any of the occurrences testified to by the witnesses or on any occasion when any threats were alleged to have been made to Haliman, the witness claimed to have been threatened. Whitfield was not called as a witness, as he assuredly would have been if he had possessed any personal knowledge of the threats. If he knew anything whatever to be the case of his own knowledge, he would have furnished valuable corroboration for Haliman, whose testimony was impeached by the fact that he was an ex-convict.

It is absurd to say that the hearsay rule can be circumvented by the device of a false affidavit by a government agent who states that the facts are true of his personal knowledge when he obviously had no such knowledge.

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### III.

#### **THE ERRONEOUS ADMISSION OF TESTIMONY TENDING TO ESTABLISH OTHER OFFENSES**

This subject was sufficiently covered in the opening brief and little need be added here. Suffice it to say that this evidence does not fall within any of the exceptions to

the general rule which excludes alleged collateral offenses from the consideration of the jury. Such evidence is admissible only where it tends to show identity, intent, motive or guilty knowledge. There was no question as to any of these matters. If the defendant made the threat which in the Information he was charged with making, there was no question as to the motive with which the threat was made, the intent or the knowledge. There was likewise not the slightest question as to the identity of the defendant. If the jury had believed the testimony of the defendant that he did not make the threat, then of course the admitted evidence was not only incompetent and immaterial, but highly prejudicial.

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### CONCLUSION

For the reasons herein as well as in the opening brief assigned, it is respectfully submitted that the judgment should be reversed and the cause remanded to the District Court with directions to quash and dismiss the Information.

Dated: April 1, 1946.

JOSEPH P. LACEY,  
HARMON D. SKILLIN,  
FRED McDONALD,  
*Attorneys for Appellant.*



No. 11118

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

W. E. BUELL,

Appellant,

VS.

SIMON NEWMAN COMPANY, a California,  
Corporation,

Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division

FILED

OCT 8 - 1945

PAUL P. O'BRIEN,  
CLERK



No. 11118

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United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

J. EVERETT BARR, ESQ.

Warrens Bldg.,  
Yreka, Calif.

Attorney for Appellant.

TREADWELL & LAUGHLIN, ESQS.

Standard Oil Bldg.,  
San Francisco, Calif.

Attorneys for Appellee.

In the District Court of the United States for the  
Northern District of California, Northern  
Division

No. 5023

W. E. BUELL,

Plaintiff,

vs.

SIMON NEWMAN COMPANY, a California Cor-  
poration,

Defendant.

### COMPLAINT

Plaintiff complains of defendant and for cause  
of action alleges:

#### I.

That plaintiff is a resident of the state of Oregon  
residing in the county of Multnomah, state of Ore-  
gon; that the defendant is a corporation incorpo-  
rated in the state of California, doing business  
within the state of California; and the amount in  
controversy herein exceeds the sum of Three Thou-  
sand Dollars (\$3,000.00).

#### II.

That upon the first day of January, 1944 de-  
fendant and the Montague Water Conservation  
District, a municipal corporation of the state of  
California, entered into a certain written lease of  
real property, a copy of which is attached hereto  
and designated Exhibit "A" and which is incor-  
porated herein as if fully set out.



## III.

That by virtue of said lease there has become due from the defendant certain rentals, the amount of which is not known to plaintiff but which plaintiff alleges on information and belief to be in excess of \$3,500.00.

## IV.

That thereafter this honorable court in a certain proceeding in regard to the Montague Water Conservation District, Bankrupt, No. 10503 approved a certain agreement of composition between plaintiff as trustee for certain bondholders of the [1\*] Montague Water Conservation District and the Montague Water Conservation District whereby the said Montague Water Conservation District assigned to plaintiff all the rents due the said Montague Water Conservation District in the year 1944.

## V.

That defendant refused and still refuses to pay said rent to plaintiff or to said Montague Water Conservation District although demand has been made upon it to do so.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. For an accounting of the rents due plaintiff by terms of said lease and by composition agreement.

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

2. For all other relief which may be equitable.

J. EVERETT BARR

Attorney for plaintiff

State of California

County of Siskiyou—ss.

J. Everett Barr, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above action; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to such matters, that he believes it to be true;

That this verification is made by affiant instead of by said plaintiff, personally for the reason that said plaintiff is now residing out of the state of California, where said affiant has his office.

J. EVERETT BARR

Subscribed and sworn to before me this 31st day of October, 1944.

[Seal]

BARBARA RANDOLPH

Notary Public in and for the County of Siskiyou,  
State of California

[Endorsed]: Filed Nov. 1, 1944. [2]

EXHIBIT A  
CROP LEASE

This Indenture, made this First day of January one thousand nine hundred and forty-four between Montague Water Conservation District, the party of the first part, hereinafter called "lessor" and Simon Newman Company the party of the second part, hereinafter called "lessee".

Witnesseth: that the lessor, for and in consideration of the covenants hereinafter mentioned on the part of the lessee to be kept and performed, has let and by These Presents does let unto the lessee, for a term of one year (12 months) commencing on the 1st day of January, 1944, and ending on the 31st day of December, 1944, all those certain parcels of land situate in the Montague Water Conservation District, County of Siskiyou, State of California, bounded and described as follows:

East  $\frac{1}{2}$  of Southeast  $\frac{1}{2}$  of Southwest  $\frac{1}{4}$ ; Southeast  $\frac{1}{4}$ ; East  $\frac{1}{2}$  of Northeast  $\frac{1}{4}$ , Section 31; All of Section 32; Northwest  $\frac{1}{4}$ ; West  $\frac{1}{2}$  of Northeast  $\frac{1}{4}$ ; Northeast  $\frac{1}{4}$  of Northeast  $\frac{1}{4}$ ; West  $\frac{1}{2}$  of Southwest  $\frac{1}{4}$ ; Northeast  $\frac{1}{3}$  of Southwest  $\frac{1}{4}$ ; Northwest  $\frac{1}{4}$  of Southeast  $\frac{1}{4}$ , Section 33; West  $\frac{1}{2}$  of Southwest  $\frac{1}{4}$ , Section 27; South  $\frac{1}{2}$ , Section 28, South  $\frac{1}{2}$ , Section 29; Southeast  $\frac{1}{4}$  of Southeast  $\frac{1}{2}$ , Section 30; less fractional part of 134.4 acres in East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$  of Southwest  $\frac{1}{4}$  and Southeast  $\frac{1}{4}$  of Section 31, Acres more or less 1965.6.

To Have and to Hold the said premises unto the lessee, for and during the term aforesaid, together with all the appurtenances thereto appertaining.

In Consideration Whereof the said lessee hereby covenant and agree to and with the said lessor that he will occupy, till and in all respects cultivate all of the herein described premises during the term hereof in a farmer-like manner and according to the usual course of farming practiced in the neighborhood; that he will not allow any of the tillable land herein demised to remain uncultivated or untilled but all of the same shall be devoted wholly to growing crops or summer fallowed in accordance with the [3] usual practice ordinarily followed in the neighborhood. That he will at his own cost, keep the fences and buildings on the premises in good repair, reasonable wear thereof and damage by elements excepted.

That lessee will deliver to the lessor, or its order, one equal one-fourth ( $\frac{1}{4}$ ) of all of the proceeds and crops produced on said premises of every kind and description, any and all hay produced to be divided on said premises in stack; all grain to be divided and lessor's share to be delivered to Montague Water Conservation District, at Montague, California either in cars or to the warehouse in Montague, California of said lessor in seasonable time after such crop shall have been gathered and harvested. The products so delivered to be an average quality of crops raised on the above described lands.



It Is Further Agreed that lessee shall furnish all seed necessary to be sown on said premises; that lessee will do, or cause to be done, all necessary work in and about the cultivation of said premises; that the lessee have full permission to enclose and pasture, or till and cultivate said premises, so far as the same may be done without injury to the reversion; and that lessee will give up and yield peaceable possession of the said premises at the expiration of the said term. The lessee shall furnish on said premises, at the proper time, all sacks needed for the handling of the grain delivered to the lessor sufficient to hold all the grain coming to the lessor.

It Is Further Agreed, that the parties of the second part will, at their own expense, furnish all necessary material for fencing and construct all necessary fences required to be constructed.

It Is Further Agreed and Understood that this lease and [4] agreement is executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lessor under the terms and conditions of a certain plan of Municipal Debt Readjustment, and petition for confirmation now on file in the United States District Court, for the Northern District of California, Northern Division and numbered 10503 therein. The lessor shall not be accountable for, nor liable to the lessee for any act on its part done in effecting or carrying out the terms and provisions of said

plan nor of any act requiring of it to be done by order of Court in said proceedings.

It is Further Agreed that lessee is expressly prohibited from assigning or sub-letting all or any part of the demised premises without the written consent of the lessor.

This lease made in accordance with, and subject to the provisions of the Irrigation District Act and the Revenue and Taxation Code of the State of California and may be cancelled in accordance with the provisions of Section 3656 of the said Revenue and Taxation Code.

In Witness Whereof, the said party of the first part has caused its president's and Secretary's signatures and its seal to be hereunto affixed by a resolution thereunto duly authorized and said party of the second part has caused his name to be subscribed thereunto.

[Seal]

MONTAGUE WATER CON-  
SERVATION DISTRICT

By SIDNEY O'CONNOR

Pres.

By ROY E. SWIGART

Secy.

Party of the First Part

[Seal]

SIMON NEWMAN CO.

By LOUIS NEWMAN,

Pres.

Party of the Second Part [5]

[Title of Court and Cause.]

ANSWER

Now comes Simon Newman Company, a California corporation, defendant in the above action, and answering the complaint, admits, alleges and denies as follows, to-wit:

I.

Defendant admits all the allegations of Paragraph I of said complaint except that it denies that the amount in controversy herein exceeds the sum of \$3,000.00.

II.

Defendant admits the allegations of Paragraph II of said complaint.

III.

Defendant denies all of the allegations of Paragraph III of said complaint.

IV.

Defendant admits that in the proceeding therein referred to, the Court approved a certain agreement set forth in said proceeding, but it denies that said agreement assigned to plaintiff all the rents due the said Montague Water Conservation District in the year 1944. On the contrary, the only provision in said agreement regarding rents was that contained in Paragraph VIII of said agreement to the effect that "All income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders," and no rents or royalties have ever accrued under said lease.

## V.

Said defendant admits that it has refused and still refuses to pay any sum claimed by plaintiff as rent of said property, although demand has been made upon it to do so, but denies that any rent ever accrued under said lease or otherwise. [6]

## VI.

Further answering said complaint, said defendant alleges that at the time of the execution of said lease and at the time that the said lease went into effect, on the 1st day of January, 1944, there was a crop of grain planted on said property. Thereafter and on the 27th day of May, 1944, the Montague Water Conservation District sold and conveyed all of the leased property to this defendant, Simon Newman Company, in consideration of the payment of \$32,420.85 by this defendant to the said Montague Water Conservation District, and at that time the said lease was merged in the title of said land. Up to that time the said crop of grain was about six inches high, and no crops of any kind had been taken off said land and no rent whatever under said lease had accrued, and title to said property, upon said merger, entirely vested in said Simon Newman Company and no part of said property or the crop thereon, as rent or otherwise, since belonged to said Montague Water Conservation District or the plaintiff herein. Pursuant to the provisions of said composition agreement and said order of this Court, the said W. E. Buell, in consideration of the payment to him of



said sum of \$32,420.85, made, executed and delivered a certificate of release, a copy of which is attached hereto marked Exhibit "A", and thereby released any claim that he had to said crop as rent of said land. Defendant further alleges that thereafter the said crop was matured and harvested by the defendant and one-quarter of said crop as matured and harvested was of the value of \$3,327.00, but it alleges that neither the Montague Water Conservation District nor the said plaintiff is entitled to any part thereof. It further alleges that said Montague Water Conservation District makes no claim to any rent under said lease. [7]

Wherefore, defendant prays that plaintiff take nothing by his said action and that defendant be discharged with its costs.

TREADWELL & LAUGHLIN  
EDWARD F. TREADWELL  
REGINALD S. LAUGHLIN

Attorneys for defendant

[Endorsed]: Filed Dec. 13, 1944. [8]

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EXHIBIT A

No. 213

CERTIFICATE OF RELEASE

This Is to Certify that W. E. Buell, as trustee, has received from Simon Newman Company (a) the sum of \$32,420.85 in cash, the receipt of which is hereby acknowledged.

In consideration of the above payment and pursuant to the provisions of that certain contract dated Dec. 6th, 1943, and entered into by and between W. E. Buell and the Montague Water Conservation District and which contract was thereafter approved and confirmed by the District Court of the United States for California in a decree entered the 4th day of March, 1944, in the case numbered 10503 entitled "In the Matter of the Montague Water Conservation District" and which decree has been filed in the records of the County Recorder of Siskiyou County, California in Book 61, Page 20 of Official Records of Siskiyou County.

The undersigned W. E. Buell, acting on behalf of all of the present outstanding bondholders of the Montague Water Conservation District as provided in the decree of the District Court of the United States for California, just above mentioned, does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District.

#### Land Description:

The  $E\frac{1}{2}$  of  $SE\frac{1}{4}$  of  $SW\frac{1}{4}$ ;  $E\frac{1}{2}$  of  $NE\frac{1}{4}$  and  $SE\frac{1}{4}$ , of Sec. 31; all of Sec. 32  $NW\frac{1}{4}$ ;  $W\frac{1}{2}$  of  $NE\frac{1}{4}$  the  $NE\frac{1}{4}$  of the  $NE\frac{1}{4}$ ;  $W\frac{1}{2}$  of the  $SW\frac{1}{4}$ ;  $NE\frac{1}{4}$  of the  $SW\frac{1}{4}$ ;  $NW\frac{1}{4}$  of the  $SE\frac{1}{4}$ ; all in Sec. 33; [9]  $W\frac{1}{2}$  of the  $SW\frac{1}{4}$ ; of Sec. 27; the  $S\frac{1}{2}$  of

Sec. 28 the S $\frac{1}{2}$  of Sec. 29; the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$  in Sec. 30; all in T46N R5W MDBM, Less the property described as follows: Beginning at a point on the south line of Sec. 31, T46N R5W MDBM, from which the SE corner of said Sec. 31 bears south 89° 51' East 3222.73 ft. and the NW corner of Sec. 6 T45N R5W, MDBM, bears North 89° 50' West 1215.27 ft. thence North 19° 44' 10" East 2808.55 ft. to a point on the North line of the SE $\frac{1}{4}$  of said Sec. 31 thence South 89° 50' East 1758.6 ft. to a point, thence South 0° 0' East 2646.5 ft. to a point on the South line of said Sec. 31, thence North 89° 50' West 2708.73 ft. to the place of beginning, containing 135.1 acres more or less.

Dated this 18th day of November, 1944.

/s/ W. E. BUELL

Trustee

State of California

County of Siskiyou—ss.

On this 18th day of November, 1944, before me, a Notary Public, personally appeared W. E. Buell, Trustee, known to me to be the person who signed the foregoing release and acknowledged to me that he signed the same as his free and voluntary act for the uses and purposes therein contained.

[Seal] /s/ BARBARA RANDOLPH

Notary Public in and for the County of Siskiyou,  
State of California

My commission expires Jan. 3, 1948 [10]

This is to certify that the Montague Water Conservation District has on this 24th day of November, 1944, cancelled on the assessment roll of the said District, all assessments for bonds and interest levied upon the lands described herein and agrees that all future assessments for paying the present outstanding bonded indebtedness on said bonds will be cancelled pursuant to the decree of the United States District Court mentioned herein.

[Seal]

MONTAGUE WATER CON-  
SERVATION DISTRICT

By /s/ ROY E. SWIGART  
Secretary [11]

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[Title of Court and Cause.]

NOTICE OF MOTION TO STRIKE

To Defendant Simon Newman Company and to  
Edward F. Treadwell and Reginald S. Laugh-  
lin, Treadwell & Laughlin, Its Attorneys:

You and each of you will please take notice that upon the 2nd day of January, 1945, at the hour of 10 o'clock A. M. of said day at the regular place of setting of the above entitled court in the Post Office Building, Sacramento, California, the plaintiff will move to strike the following portions of defendant's answer:

Paragraph VI together with Exhibit A.

That said motion will be made upon the ground



that said portion of said answer is redundant, superfluous and does not constitute a valid defense.

Dated: December 18th, 1944.

J. EVERETT BARR

Attorney for Plaintiff

[Endorsed]: Filed Dec. 20, 1944. [12]

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[Title of Court and Cause.]

### STIPULATION AS TO FACTS

The parties to the above entitled action hereby stipulate to the following facts:

#### I.

The plaintiff is a resident of the State of Oregon, residing in the County of Multnomah, and defendant is a corporation incorporated in the State of California, doing business in the State of California.

#### II.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit "A" attached to the complaint.

#### III.

At the time of the execution of said lease and at the time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land

to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

#### IV.

The Court may take judicial notice of the proceedings in Montague Water Conservation District, bankrupt, No. 10503, and the agreement of composition therein, and it is stipulated that in Paragraph VIII of said agreement it was provided that "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders". [13]

#### V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit "A" attached to the answer herein. This admission is made subject to the motion of plaintiff to strike said certificate from the answer, and subject to any objection thereto which plaintiff may desire to make on the trial.

#### VI.

Montague Water Conservation District makes no

claim against Simon Newman Company for any rent under said lease.

J. EVERETT BARR

Attorney for Plaintiff

TREADWELL & LAUGHLIN

Attorneys for Defendant

[Endorsed]: Filed Jan. 18, 1945. [14]

---

[Title of Court and Cause.]

OPINION AND ORDER.

Plaintiff sued defendant for rentals which he claimed exceeded \$3500.00, and became due under a lease by Montague Water Conservation District (hereinafter referred to as the "District"). The said plaintiff is the Trustee in the matter of the Montague Water Conservation District, Bankruptcy No. 10,503 in this court. Said lease was made and entered into by and between said District and defendant on the 1st day of January, 1944. A copy thereof is attached to plaintiff's complaint as Exhibit "A".

Defendant denied in its answer that any rent was due and alleged that at the time said lease went into effect the crop of grain on the lands so leased was about six inches high; that on the 27th day of May, 1944, said District sold and conveyed all of the leased property to defendant in consideration of the payment of \$32,420.85, at which time said lease was merged in the title of said land;

and that said plaintiff executed and delivered to plaintiff a release of any claims, a copy of which was attached as Exhibit "A" to said answer.

Plaintiff moved to strike said affirmative defenses and said exhibit from defendant's answer.

The parties stipulated as to certain facts, the material portions of which stipulation are as follows:

## “II.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit 'A' attached to the complaint.

## III.

At the time of the execution of said lease and at the [15] time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

## IV.

The Court may take judicial notice of the proceedings in Montague Water Conservation District, bankrupt, No. 10503, and the agreement of composition therein, and it is stipulated that in Paragraph



VIII of said agreement it was provided that 'All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders'.

V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit 'A' attached to the answer herein."

Both the lease and the release above mentioned refer to the agreement of composition, dated the 6th day of December, 1943, between plaintiff herein and the District.

The lease recited that it was "executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lease under the terms and conditions of a certain plan of Municipal Debt Readjustment and petition for confirmation now on [16] file in the United States District Court for the Northern District of California, Northern Division, and numbered 10503 therein." It thereby put both of its executing parties on notice as to the terms and provisions of said plan and the court proceedings with respect thereto. Said plan contemplated the full release of all lands whereon payments of the amounts specified in said agreement were made.

Said release also referred to the same plan. It recited: "In consideration of the above payment,

and pursuant to the provisions of that certain contract dated Dec. 6th, 1943, and entered into by and between W. E. Buell and the Montague Water Conservation District . . . (Buell) does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District."

This, again, emphasizes that all transactions between the parties to this litigation and the District, subsequent to December 6, 1943, were conditioned upon and made pursuant to the said agreement between plaintiff and said District on said December 6, 1943.

The primary purpose of all the dealings of plaintiff, defendant and said District was to carry out the intentions of the contracting parties to the first agreement of December 6, 1943. Included among such intentions appears that of inducing former owners of the lands in said District to buy back such lands from the District so that revenue could again be derived therefrom.

Evidently this purpose was accomplished as to the lands herein involved, for defendant raised sufficient funds to consummate a deal. The amount of the price, to-wit: \$32,420.85, was [17] satisfactory to both plaintiff and defendant. That this was entirely satisfactory is shown by the fact that neither party has sought to avoid responsibility under either the sale or the release. It does not

seem reasonable for this suit to be maintained as an aftermath.

Said plaintiff and defendant, when so contracting on November 18, 1944, must have had in contemplation that the price agreed upon was the full amount which defendant was to pay and plaintiff was to receive. As reference was directly made to the agreement of December 6, 1943, between plaintiff and the District, said plaintiff must have realized that his delivery of the deed to defendant would end the payment of money to him by defendant by reason of any and all transactions then, and theretofore, had between them.

The original document referred to by the parties as the agreement of composition was filed in this court on the 10th day of December, 1943. It was therein recited that said parties submitted a plan of adjustment in accordance with the provisions of Sections 81 to 84 of the United States Bankruptcy Act; that said Buell, as trustee for all bondholders, would accept from any individual landowner in the District in full settlement of the liability of such landowner for the payment of all his outstanding bonds and coupons of the District, whether due or to become due, the amount set forth in Exhibit "B", attached thereto, opposite the description of said land.

Certain land described in said Exhibit "B" was designated "Tract No. 62 District—formerly Simon Newman Company . . . 135.1 acres."

It was further recited that if the specified "cash price" were paid in cash on or before ninety days



after the final confirmation of this plan by the United States District Court as provided in paragraph 3 of said agreement, said Buell would give full release therefor. [18]

It was also provided, in paragraph 8, "all income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders."

Plaintiff's contention in his complaint herein is that said bondholders thereby became entitled to the sum of \$3500.00, by reason of the lease (Exhibit "A" to said complaint), which provided that the lessee will deliver to the lessor, or its order, one-fourth ( $\frac{1}{4}$ th) of all of the proceeds and crops produced on said premises of every kind and description.

It was further provided, in paragraph 9, of said agreement that whenever land had been released from obligation pursuant to said agreement, the said trustee would make, execute and deliver to the owner of said land a release substantially in the form of Exhibit "C" thereto attached. Exhibit "A" annexed to defendants' answer is substantially in the form of said Exhibit "C" attached to said agreement of composition.

The Court is inclined to agree with defendant that the execution of said release, taken in conjunction with all the other documents stipulated to have been executed, indicated that not only the land, but defendant, as the purchaser thereof, was released from any further liability for payments to the District or to plaintiff as trustee.



One of the cardinal rules in the interpretation of contracts is that courts should endeavor to ascertain the intention of the parties.

The District and the defendant when entering into the crop lease used the expression "proceeds and crops produced on said premises" with reference to the percentage of one-fourth which the lessee (defendant) was to deliver to the lessor (District). This indicates that they intended that the crops should be matured [19] and harvested before the percentage would become due to the District. Otherwise, there would be no "proceeds" to pro rate. Neither would there be any crops to divide. That such was the intention is further indicated by the reference to hay and grain, thus—"any and all hay produced to be divided on said premises in stack; all grain to be divided and lessor's share to be delivered to Montague Water Conservation District at Montague, California, either in cars or to the warehouse in Montague, California, of the said lessor in seasonable time after such crop shall have been gathered and harvested."

Obviously the hay could not be delivered until it had been cut and stacked. The grain could not be divided or delivered as provided until after it had been "gathered and harvested."

The stipulation as to facts sets forth that on the 27th day of May, 1944, when the District sold and conveyed the leased land to defendant, "the crop of grain was about six inches high and no crops

of any kind had been taken off said land." There was, at said time, therefore, no crop to divide, and there were no proceeds to pro rate.

There was, accordingly, not sufficient evidence to sustain plaintiff's allegation that there was due from defendant rentals in the amount of \$3500.00, or thereabouts.

Defendant set up in its answer that the lease was merged in the title of said land when it made the purchase from the plaintiff; that upon the vesting of the title in defendant, no part of said property or the crop thereon, as rent or otherwise, belonged to the District or to plaintiff.

It was said in *Jameson v. Hayward*, 106 Cal. 683, 39 Pac. 1078: ". . . equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intent of the parties." What has been said hereinbefore [20] indicates the view of this Court with reference to the intention of the District and plaintiff in entering into the lease. It is our further view that plaintiff, by the terms of the agreement of December 6, 1943, and of the release of November 18, 1944, intended that all liability of defendant with respect to the District, the bondholders and plaintiff acting in his representative capacity, would be discharged by the payment of the sum of \$32,420.85 when he delivered to it the deed.

It is likewise our view that the purposes of justice will be best subserved by holding that no rent was due from defendant to plaintiff at the

time of the commencement of the above entitled action. It would be unconscionable, under the circumstances of this case, to require defendant to pay plaintiff rental on a crop which was but six inches high at the time defendant became the owner of the land whereon said crop was growing.

The doctrine of merger is well explained in annotation in 143 A.L.R., 93-132. It is therein stated that "whenever an estate for years and a greater estate vest in the same person without any intermediate estate, the estate for years is merged in the greater estate." (p. 96)

Otis v. McMillan, 70 Ala. 45, is cited on the point: "There can be no greater absurdity, than to place Otis in the relation of being his own landlord and his own tenant at one and the same time." (p. 97)

Chancellor Kent is quoted: "There would be an absolute incompatibility in a person filling at one and the same time the character of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger." (p. 97)

The Annotator states on page 124: "Where a leasehold estate for years is absorbed by the operation of the doctrine of merger, the lessee's obligation to pay rent is terminated." [21]

Erving v. Goodman Company Bank, 171 Cal. 559, 153 Pac. 945, and other California cases, together with several other jurisdictions are cited in support thereof. In the Erving case it was said (p. 563): "That when the fee vested in the bank's predeces-



sor, the covenant to pay rent for the realty became of no effect."

We believe that a reasonable construction of all the agreements referred to in the pleadings and the stipulation as to facts, and the proceedings in the bankruptcy matter, of which this Court is to take judicial notice pursuant to said stipulation, leads to the conclusion that the bondholders, on whose behalf plaintiff is acting, are not entitled to receive the allotted payment of \$32,420.85 made by defendant as a purchaser of the lands, and rentals in addition.

It Is Therefore Ordered that plaintiff's motion to strike be, and the same is, hereby denied, and that defendant have judgment, with costs.

Counsel for defendant will prepare findings.

Dated: June 20, 1945.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed June 21, 1945. [22]

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At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 21st day of June, in the year of our Lord one thousand nine hundred and 45.

Present: The Honorable Martin I. Welsh.

[Title of Cause.]

The motion to strike and this case having been heretofore heard and submitted, being now fully



considered, and the Court having filed its written opinion and order thereon, it is, in accordance with said opinion and order, Ordered that the motion to strike be and the same is hereby denied. It is further Ordered that judgment be entered herein in favor of the defendant and against the plaintiff with costs, upon findings of fact and conclusions of law to be prepared by the defendant and submitted to the Court. [23]

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[Title of Court and Cause.]

## FINDINGS OF FACT

From the pleadings and stipulation as to facts, the Court finds the following to be the facts:

### I.

The plaintiff is a resident of the State of Oregon, residing in the County of Multnomah, and defendant is a corporation incorporated in the State of California, doing business in the State of California.

### II.

On the 6th day of December, 1943, an agreement was entered into between W. E. Buell, acting on behalf of the bondholders of Montague Water Conservation District, hereinafter referred to as the District, and Montague Water Conservation District, reciting that the District was an irrigation district duly organized under the laws of the State

of California; that it had issued coupon bonds in the total sum of \$1,395,000; that the bonds and coupons thereon were unpaid; that Buell was the hold of 90.9% of the outstanding bonds; that the bonds and coupons were in an amount greater than the District could pay; that negotiations between Buell and the District had been carried on, looking toward a compromise and a reduction of the outstanding bonded indebtedness of the District, and a waiver of the general obligation feature of the bonded indebtedness and an agreement permitting any individual land owner to pay his adjusted share of the outstanding bonded indebtedness and thus relieve his land of further liability for the payment of all the outstanding bond and interest indebtedness; and that a schedule had been prepared in which each tract of land in the District had been listed and an amount set opposite the same, which schedule was attached to the contract and marked Exhibit "B". [24]

(Said schedule set forth a description of the land described in the lease hereinafter referred to, giving the record title holder as "District Formerly Simon Newman Company", the number of acres as 1964.9, and the cash price as \$32,420.85.)

It was then agreed that a plan of adjustment in accordance with the provisions of Sections 81 to 84 of the United States Bankruptcy Act should be submitted to the United States District Court for the Northern District of California, which plan should be in substance as follows:

1. That Buell, as Trustee for the bond holders, would accept from any individual land owner the amount set forth in said schedule, if paid in cash on or before 90 days after the final confirmation of the plan, and would give full release therefor.

2. That in lieu of cash said Buell would accept from any land owner a note and deed of trust on the land for such amount.

3. That with respect to all private properties purchased by the District for non-payment of assessments, upon the expiration of 90 days from the date of final confirmation of the plan the District would execute and deliver to Buell a deed thereof, and that all land so conveyed to Buell should be released from liability to pay the outstanding bonds and coupons.

4. That all payments made to Buell, as Trustee for the bond holders, under the plan, or received by him from the sale or rental of any lands acquired by him by deed from the District or by foreclosure of any mortgage or deed of trust held by him, should be deposited in the Portland Trust and Savings Bank in Portland, Oregon, for the benefit of the bond holders. [25]

5. That whenever all lands in the District have been released from liability for the payment of the bonds and coupons issued by the District, by the payment of cash or the execution of a deed of trust, Buell, as Trustee of all the bond holders, should deliver all of the bonds and coupons to the District for cancellation.



6. That the District should exclude certain land from the District, not including the land referred to in this action.

7. That individual land owners may make their offer to pay, pursuant to the terms of paragraphs I and II, either to Buell, as Trustee for the bond holders, or to the Secretary of the District.

8. "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders, provided that if this contract shall not be approved by the United States District Court for the Northern District of California, such rentals, royalties and leases shall belong to the District. Also provided however that from such rental there shall be deducted and retained by the district an amount equal to the maintenance and operation assessments that would have been levied upon the lands from which such rental is derived had the lands been in private ownership."

9. "Whenever land has been released from obligation pursuant to paragraphs I and II hereof, the said Trustee, shall make, execute and deliver to the owner of such land a release substantially in the form of Exhibit 'C' hereto attached, which release shall be acknowledged so that it may be recorded in the records of the County of Siskiyou, State of California."



**“CERTIFICATE OF RELEASE**

“This Is to Certify that William E. Buell, as trustee, has received from.....(a) the sum of \$.....in cash or (b) a mortgage upon the land hereinafter described for the sum of \$....., the receipt of which is hereby acknowledged. [26]

“In consideration of the above payment delivery of mortgage and pursuant to the provisions of that certain contract dated....., 19.. and entered into by and between William E. Buell and the Montague Water Conservation District and which contract was thereafter approved and confirmed by the District Court of the United States for California in a decree entered the.....day of....., 19.. in the case numbered..... entitled ‘In the Matter of the Montague Water Conservation District’ and which decree has been filed in the records of the County Recorder of Siskiyou County, California, in Book....., Page..... of official records of Siskiyou County.

“The undersigned William E. Buell, acting on behalf of all of the present outstanding bond holders of the Montague Water Conservation District as provided in the decree of the District Court of the United States for California, just above mentioned, does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the

present outstanding bonds and interest thereon of the Montague Water Conservation District.

Land Description:

“Dated this.....day of..... 19...

“WILLIAM E. BUELL,

Trustee

By.....

“State of.....:

County of.....:—ss.

“On this.....day of....., 19.., before me, a....., personally appeared ....., known to me to be the person who signed the foregoing release and acknowledged to me that he signed the same as his free and voluntary act for the uses and purposes therein contained.

.....  
 ..... [27]  
 .....

“My commissioner expires.....”

10. “No segregation of the separately priced parcels shown in Exhibit ‘B’ will be accepted and releases will only be executed for any entire parcel of land so separately described and priced in Exhibit ‘B’.”

11. That the District would pay to the Trustee, for the benefit of the bond holders, the proceeds of certain condemnation proceedings not affecting the property involved in this action.

## III.

On the 1st day of January, 1944, defendant and Montague Water Conservation District entered into the written lease, Exhibit "A" attached to the complaint.

## IV.

At the time of the execution of said lease and at the time that said lease went into effect on the 1st day of January, 1944, there was a crop of grain planted on said property. On the 27th day of May, 1944, the District sold and conveyed the leased land to defendant in consideration of the sum of \$32,420.85. Up to that time the crop of grain was about six inches high and no crops of any kind had been taken off said land. At a later date the crop was matured and harvested by defendant, and one-quarter of said crop as matured and harvested was of the value of \$3,327.00.

## V.

On the 18th day of November, 1944, W. E. Buell, in consideration of the payment to him of said sum of \$32,420.85, made, executed and delivered the certificate marked Exhibit "A" attached to the answer herein. [28]

## VI.

Montague Water Conservation District makes no claim against Simon Newman Company for any rent under said lease.

## VII.

The said plan contemplated the full release of all lands whereon payments of the amounts specified in said agreement were made, and the lease involved herein was conditioned upon and made pursuant to said agreement between plaintiff and said District of December 6, 1943. The primary purpose of all dealings of plaintiff and defendant and said District was to carry out the intentions of the contracting parties to the agreement of December 6, 1943. Included among such intentions appears that of inducing former owners of land in said District to buy back the land in said District so that revenue could again be derived therefrom. The plaintiff and defendant must have had in contemplation that the price agreed upon was the full amount which defendant was to pay and plaintiff was to receive. Said agreement contemplated that upon payment of the cash price within 90 days after confirmation of the plan, Buell should give full release. The release given by plaintiff, taken in conjunction with all the other documents, indicated that not only the land but the defendant, the purchaser thereof, was released from any further liability for payments to the District or to plaintiff, as Trustee. The lease contemplated that the crops should be matured and harvested before the percentage thereof due to the District would become due. The hay could not be delivered until it was cut and stacked, and the grain could not be divided or delivered until it was gathered and harvested. At the time of the sale the grain was the only crop on



the land and was only six inches high, and there was at that time no crop to divide and there were no proceeds to prorate and there was no rental then due [29] under the lease, and any right to rental was merged in the title which defendant obtained when it purchased the land from the District. It would be unconscionable, under the circumstances of this case, to require defendant to pay plaintiff rental on a crop which was but six inches high at the time the defendant became the owner of the land whereon said crop was grown.

### VIII.

It is the reasonable construction of all agreements referred to in the pleadings and the stipulation as to facts and the proceedings in the bankruptcy matter, of which this Court is to take judicial notice, that the bond holders, on whose behalf plaintiff was acting, are not entitled to receive the allotted payment of \$32,420.85 made by defendant as the purchaser of the land, and rentals in addition.

### CONCLUSION OF LAW

As a conclusion of law the Court finds and decides that plaintiff take nothing by his action, and defendant recover its costs herein expended.

Dated this 6th day of July, 1945.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed July 6, 1945. [30]

In the District Court of the United States for  
the Northern District of California, Northern  
Division.

No. 5023

W. E. BUELL,

Plaintiff,

vs.

SIMON NEWMAN COMPANY, a California  
Corporation,

Defendant.

### JUDGEMENT

In the above entitled action, the defendant having appeared and answered and said action having been duly submitted to the Court for decision upon a stipulation as to the facts, and said matter having been argued by counsel and submitted to the Court, and the Court being now fully advised in the premises and having filed herein written findings of fact and conclusions of law,

Now, Therefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed that plaintiff take nothing by his said action and that defendant have and recover from plaintiff its costs of suit herein expended.

Dated this 6th day of July, 1945.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed July 6, 1945. [31]

[Title of Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS

Notice is hereby given that W. E. Buell plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 6th day of July, 1945.

Dated and signed this 10 day of July, 1945.

J. EVERETT BARR

Attorney for Appellant

[Endorsed]: Filed July 17, 1945. [32]

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[Title of Court and Cause.]

NOTICE TO PREPARE TRANSCRIPT

To the Clerk of the Above-Entitled Court:

You will please take notice that the above-entitled matter has been appealed to the Circuit Court of the United States in and for the Ninth Circuit, and the appellant herein requests that a transcript be prepared containing the following items: The Complaint on file herein together with Exhibits attached thereto; Answer of the defendant together with Exhibit attached thereto; the Stipulated Facts; Notice of Motion to Strike; the Ruling of the Court; the written Opinion of the Court, if any; the Findings of Fact and Conclusions of Law; and the Judgement.

Dated this 16th day of July, 1945.

J. EVERETT BARR

Attorney for Plaintiff

(Affidavit of service attached hereto)

[Endorsed]: Filed July 17, 1945. [33]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT TO TRANSCRIPT ON APPEAL.

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of *W. E. Buell vs. Simon Newman Company*, No. 5023, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Notice to Prepare Transcript, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Thirteen and 40/100 (\$13.40), and that the same has been paid to me by the attorney for the appellant herein.



In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 3rd day of August, A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By F. M. LAMPERT

Deputy Clerk. [34]

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[Endorsed]: No. 11118. United States Circuit Court of Appeals for the Ninth Circuit. W. E. Buell, Appellant, vs. Simon Newman Company, a California Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed August 6, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the Circuit Court of Appeals of the United  
States in and for the Ninth Circuit

No. 11118

W. E. BUELL,

Plaintiff and appellant,

vs.

SIMON NEWMAN COMPANY, a California cor-  
poration,

Defendant and appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY AND  
DESIGNATION OF PORTION OF REC-  
ORD TO BE PRINTED.

To the Appellee Simon Newman Company and to  
Treadwell and Laughlin, Its Attorneys and to  
the Clerk of the Above Court:

You and each of you will please take notice that  
the appellant requests that the entire transcript in  
the above matter be printed.

You will further please take notice that the  
appellant will rely upon the following points upon  
appeal.

A. That the findings are not in accordance with  
the evidence.

B. That the answer of the appellee did not state  
a valid and sufficient defense.

C. That the release given by the appellant and  
set forth in appellees answer did not release ap-  
pellee from the contractual obligation to pay rent.

D. That the sale of the land to the appellee did not act as a merger of the title and rent in that a previous grant of the rent had been made to appellant.

Dated and Signed this 10th day of August, 1945.

.....

Attorney for Appellant.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Aug. 17, 1945. Paul P. O'Brien, Clerk.





No. 11118

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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W. E. BUELL,

Appellant,

vs.

SIMON NEWMAN COMPANY, a California  
Corporation,

Appellee.

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SUPPLEMENTAL  
Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division

FILED

DEC 26 1945

PAUL P. O'BRIEN,  
CLERK



No. 11118

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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W. E. BUELL,

Appellant,

vs.

SIMON NEWMAN COMPANY, a California  
Corporation,

Appellee.

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SUPPLEMENTAL  
Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Northern Division





## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Circuit Court of Appeals of the United  
States in and for the Ninth Circuit

No. 11118

W. E. BUELL,

Plaintiff and Appellant,

vs.

SIMON NEWMAN COMPANY, a California cor-  
poration,

Defendant and Appellee.

NOTICE OF MOTION THAT CERTAIN  
PAPERS BE MADE PART OF RECORD

To Simon Newman Company, Defendant and Ap-  
pellee, and to Treadwell and Laughlin, Its At-  
torneys

You and each of you will please take notice that upon Monday, the 19th day of November, 1945, at the hour of 10:00 o'clock A.M. of said day at the regular place of setting of the above entitled court, appellant will move that the documents attached hereto be made a part of the record, said documents being Petition for Composition, Agreement of Composition, and Interlocutory Decree of the court approving petition, in the matter of the Montague Water Conservation District, Bankrupt, No. 10503, in the United States District Court, in and for the Northern District of California, Northern Division; said motion will be based upon the stipulation attached hereto.

Certified copies of the documents involved are annexed hereto as exhibits.

Dated this 31 day of October, 1945.

J. EVERETT BARR,  
Attorney for Appellant.

[Endorsed]: Filed November 3, 1945. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

#### STIPULATION

It Is Stipulated by and between the parties that the above entitled Court, on the appeal herein, may take judicial notice of the proceedings in the matter of Montague Water Conservation District, Bankrupt, No. 10503, in the United States District Court for the Northern District of California, Northern Division.

It Is Further Stipulated that the appellant shall furnish the Court with a copy of the said proceedings, consisting of the petition for composition, including the agreement of composition attached



thereto, and the order of Court approving such petition.

Dated this 17th day of August, 1945.

J. EVERETT BARR,  
Attorney for Appellant.

TREADWELL & LAUGHLIN.

EDWARD F. TREADWELL,

By REGINALD S. LAUGHLIN,  
Attorneys for Appellee.

The foregoing stipulation is approved.

.....  
Presiding Judge.

[Endorsed]: Filed November 3, 1945, Paul P. O'Brien, Clerk.

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At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the nineteenth day of November, in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Francis A. Garrecht, Senior Circuit Judge, Presiding; Honorable Clifton Mathews, Circuit Judge; Honorable William Healy, Circuit Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO INCLUDE  
WITHIN TRANSCRIPT OF RECORD  
CERTAIN DOCUMENTS IN THE MAT-  
TER OF MONTAGUE WATER CONSER-  
VATION DISTRICT

Upon consideration of the motion of appellant for inclusion within the transcript of record in this cause of certain documents filed in the District Court of the United States for the Northern District of California, Northern Division, in a matter therein entitled "In the Matter of Montague Water Conservation District, Bankrupt, No. 10503," and of the stipulation of counsel for respective parties, and good cause therefor appearing,

It Is Ordered that said motion be, and hereby is granted, and that the following papers, viz. Petition for Composition, Agreement of Composition and Interlocutory Decree of said District Court approving Petition, filed in the Matter of the Montague Water Conservation District, Bankrupt, No. 10503 be, and they hereby are made a part of the transcript of record in this cause.

This Agreement made and entered into this sixth day of December, 1943, by and between W. E. Buell and the Montague Water Conservation District hereinafter referred to as the District.

Witnesseth:

Whereas, the District is an Irrigation District duly organized under the Laws of California re-

lating to the organization of Irrigation Districts, in the year 1925 and has existed continuously since that date as an irrigation district located in Siskiyou County, California.

Whereas, on or about the 1st day of January, 1926, the District caused to be issued and sold in the manner provided by law its coupon bonds in the total sum of \$1,395,000.00 bearing interest at 6% per annum which interest is evidenced by semi-annual interest coupons attached to each of said bonds, and such bonds being in denominations of \$1,000.00 and payable to bearer, and numbered consecutively from 1 to 1395 and maturing annually from 1947 to 1966;

And Whereas, none of the principal of said bonds has been paid and the interest coupon on bonds number 1 to 275 inclusive and 296 to 1395 inclusive due the 1st day of January, 1931 and subsequent, and coupons due the 1st day of July, 1932 and subsequent, on bonds number 276 to 295 have not been paid and all coupons due subsequent to the 1st day of July, 1932 have not been paid.

And Whereas, the said Buell has in his possession for the purposes of collection \$1,265,000.00 par value of said bonds and the interest coupons attached thereto which is (.909) 90.9% of the outstanding bonds;

And Whereas, and compromise or liquidation of the outstanding bonds of the District must take into consideration the owners of the bonds not held

by the said Buell. These owners shall be hereinafter referred to as the non-deposited bondholders;

And Whereas, a schedule has been prepared and attached hereto and marked Exhibit "A" and by reference made a part hereof containing the numbers, denominations and amounts of all bonds and coupons in the possession of the said Buell;

And Whereas, the District has made no levy for the purpose of paying the outstanding bonds and coupons since 1932, except a levy for \$3,000.00 made in 1942;

And Whereas, all the bonds and coupons issued and above mentioned are a general obligation of the District;

And Whereas, it is agreed by the parties hereto that the outstanding bonds and coupons are in an amount greater than the District can pay within the time set for the maturity of said bonds and coupons;

And Whereas, the said Buell and the District have carried on negotiations looking toward a compromise and a reduction of the outstanding bonded indebtedness of the District, and a waiver of the general obligation feature of the bonded indebtedness and an agreement permitting any individual land-owner to pay his adjusted share of the outstanding bonded indebtedness and thus relieve his land of further liability for the payment of all the outstanding bond and interest indebtedness;

And Whereas, a schedule has been prepared by



the parties hereto in which each tract of land in the District has been listed and an amount set down opposite the description of each tract and such schedule has been attached hereto marked Exhibit "B" and by reference made a part of this contract;

Now, Therefore, in consideration of the mutual covenants and agreements hereinafter provided the parties hereto agree as follows, and submit the following as a plan of adjustment in accordance with the provisions of Section 81 to 84 of the United States Bankruptcy Act.

### I.

That the said Buell, as trustee for all bond holders, will accept from any individual land owner in the District in full settlement of the liability of such land for the payment of all the outstanding bonds and coupons of the District whether due or to become due the amount set forth in Exhibit "B" opposite the description of such land in the column marked "Cash Price" if paid in cash on or before ninety days after the final confirmation of this plan by the U. S. District Court as provided in paragraph III hereof, and give full releases therefore as provided herein.

### II.

That said Buell, as trustee for all of the bond holders, will accept from any land owner, not desiring to pay in cash as just above provided, in full settlement of the liability of such land for the payment of all the outstanding bonds and coupons

of the District whether due or to become due, a note and a first deed of trust upon the land of such land owner containing the following term and amounts, to-wit:

(a) Such note and deed of trust shall be in an amount equal to the amount shown opposite the description of such land in Exhibit "B", in the column marked "Term Price" and shall be for a term of not to exceed 10 years and shall bear interest at the rate of 5% per annum from the date of execution of the note and deed of trust, if made prior to 90 days after final confirmation of the plan by the District Court of the United States as provided in paragraph III hereof, if executed subsequent to expiration of said 90 day period, said note and deed of trusts shall bear interest from the date of the expiration of such 90 day period, and such note and deed of trust shall be payable as follows:  $\frac{1}{10}$  of the principal upon the execution of such note and deed of trust and  $\frac{1}{10}$  or more of the remaining principal and the earned interest each year thereafter until the full sum is paid in full. Provided, however, that any land owner desiring to relieve his land by the execution of a note and deed of trust as provided above shall prior to the execution of such deed of trust furnish the said bond holder with satisfactory proof that all taxes, liens and encumbrances of all kinds have been paid or subrogated to the lien of such deed of trust, and further satisfactory proof that such land owner has merchantable title to the land sought to be conveyed in trust, which proof may

be by abstract or a policy of title insurance issued by a company authorized to do business in California. Taxes and assessments which have become a lien but are not yet payable shall be excepted from the foregoing. The policy to be delivered contemporaneously with the recordation of the deed of trust.

(b) Should any individual land owner desire to release his land from the obligation of the outstanding bonds and coupons, either by the payment of cash or the execution of a note and deed of trust, after the expiration of 90 days from the final approval of this contract by the District Court of the United States, the said Bond holders will accept such cash payment or delivery of note and deed of trust and release such lands in the manner herein provided; provided, however, that the amount of such cash payment or note shall be increased ten per cent over the amount shown opposite the description of such land in Exhibit "B" in the columns marked "Term Price" or "Cash Price", as the case may be, for each year or fraction thereof after the expiration of said 90 day period.

### III.

That in consideration of the agreement by said bondholders to release the lands in the District from liability for payment of the outstanding bonds and coupons of the District in the manner provided above the District agrees:

(a) To pay to the bondholders all Money in the



Bond fund of the District upon the confirmation of this contract by the U. S. District Court as provided in paragraph III (E) and to pay to the bondholders from time to time all money that thereafter may accrue to said bond fund and also to make all annual levies for bond and interest in an amount and at the times required by the Irrigation District Laws of California.

(b) To enforce the collection of such levies and take deeds at the time and in the manner provided by the laws of California, and to pay all such collections to the bondholders or their legal representative. The District shall take deeds of all lands sold to the District for such delinquent levies immediately upon the expiration of the time provided for redemption.

(c) To cancel any such levies heretofore made or hereafter to be made upon lands in the District which have been released from liability for the payment of the outstanding bonds and coupons in the manner provided in paragraphs I and II hereof and upon lands conveyed to the bond holders or their legal representative pursuant to this plan; provided that the amount of such sums so cancelled shall be considered paid and be credited on the books of the District as a payment upon the outstanding bonds and interest coupons, and the parties hereto agree that the bond and interest debt shall thereupon be deemed to be paid and reduced in the amount of the assessment so cancelled.

(d) To take collector's deed to all private prop-



erties heretofore and on or before the 24th day of August, 1939, sold to the District for delinquent assessments, as to which such deeds have not heretofore been taken exclusive, however, of property now used for public governmental purposes, and to secure by negotiation or purchase all title of the City of Montague and of the State of California, in and to lands to which the District also holds title, and upon the expiration of ninety days from the date of final confirmation of this contract by the United States District Court, as provided in paragraph III hereof, the District agrees to execute and deliver to the said Buell a deed to all non-operative property then standing in the name of the District, exclusive of property now used for public government purposes. The District shall also, as title thereto is acquired, convey to Buell all lands hereafter acquired by the District prior to the 1st day of January, 1942, as well as all lands hereafter acquired by the District by reason of non-payment of assessments levied by the District for bond and interest payments, the latter irrespective of whether upon such lands there be unpaid assessments levied since December 31, 1941, for maintenance and operation. All non-operative property now owned by the District and used for public governmental purposes shall also be conveyed to Buell when such use ceases. Said deeds and conveyances shall convey said lands free and clear of all taxes and assessments due and unpaid at the time of the delivery thereof, except as to lands acquired subsequent to the 24th day of August,

1939, upon sales to the District for delinquent assessments and these lands shall be deeded to Buell, free and clear of all District assessments and if there be unpaid state, county, or city taxes upon such lands the District shall pay such taxes in excess of a sum equal to the total amount of the last three unpaid maintenance and operation assessments levied upon such lands by the District, and all such deeds of conveyance to Buell mentioned above shall contain a special warranty of all proceedings on which the title to such lands was acquired by the District and no other warranty. All property conveyed to Buell shall be released from liability to pay the outstanding bonds and coupons. All such property so deeded to Buell shall be sold or rented by him on such terms and at such prices as he shall determine in his best judgment as trustee for all of the bondholders of the District.

(e) To institute, upon the execution of this agreement, at its own expense, a proceeding in the United States District Court for the Northern District of California, under the provisions of the Bankruptcy acts of the United States relating to debt adjustments of Municipal Corporations, for the purpose of:

(1) Securing the confirmation of this plan by the said Court; and

(2) Binding to the terms of this plan all outstanding bonds and coupons issued by the District as provided by the said Bankruptcy Act; and

(3) Securing the confirmation of the Court to the provisions of this plan relating to the distribution of the moneys received by the bond holders as provided herein.

#### IV.

All payments made to the said Buell, as trustee for all the bond holders under this plan or received by him from the sale or rental of any lands acquired by him by deed from the District or by foreclosure of any mortgage or deed of trust held by him, may be deposited by said Buell as trustee forthwith in the Portland Trust and Savings Bank in Portland, Oregon and from such moneys so deposited the said Portland Trust and Savings Bank shall deduct all reasonable charges and expenses and shall then divide the balance remaining between the non-depositing bond holders and said Buell in accordance with their proportionate interests therein. The said Portland Trust and Savings Bank shall pay to the non-depositing bond holders from time to time upon demand their respective shares of the money so received as determined above. Provided, however, that before any non-depositing bond holder shall be entitled to receive any money from said Portland Trust and Savings Bank as provided above, he shall deposit with the said Portland Trust and Savings Bank any bonds and coupons held by him and he further shall agree in writing that such bonds and coupons shall be held in conformity with the plan of debt adjustment provided by this agreement and shall authorize in writing the said Portland Trust and Savings Bank to deliver the said



bonds to the District for cancellation upon the completion of the plan contained herein.

#### V.

It is further agreed and understood that whenever all lands in the District have either been released from liability for the payment of the bonds and coupons issued by the District by the payment of cash or the execution of a deed of trust as provided herein or have been deeded to said Buell, as trustee for all the bondholders, as provided in paragraph III hereof, then the Portland Trust and Savings Bank shall be authorized to deliver all of the bonds and coupons deposited with it to the District for cancellation, and it is further understood and agreed that during the time this contract is in operation the bonds and coupons now on deposit or which may hereafter be deposited with the Portland Trust and Savings Bank pursuant to this contract shall be held by said Portland Trust and Savings Bank in escrow and shall not be taken from escrow except by agreement of the parties hereto.

#### VI.

It is further agreed and understood that the District will, upon the execution of this contract, take the necessary legal steps to exclude from the District all lands, now owned by the District, which, according to the original engineering plans of the District, were to be served with Irrigation Water from the Lateral "A" canal of said District. It is further agreed and understood that upon the



conclusion of the exclusion proceedings just above mentioned and upon the confirmation of this plan by the U. S. District Court as provided in Paragraph III (E) hereof the District will execute and deliver to the said Buell as trustee for all bondholders a good and sufficient bill of sale conveying to said Buell as trustee for all the bondholders all of the right title and interest of said District to that certain water turbine, pump and valves now located in the pumping plant built to supply water to the Lateral "A" canal as the said turbine, pump and valves would be no longer needed as operating property of the District.

#### VII.

Individual land owners may make their offer to pay pursuant to the terms of paragraphs I and II hereof, either to the said Buell, as trustee for all the bondholders personally or to the Secretary of the District at its Office in Montague, California, for the account of said Trustee.

#### VIII.

All income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders, provided that if this contract shall not be approved by the United States District Court for the Northern District of California, such rental, royalties and leases shall belong to the District. Also provided, however, that from such rental there shall be deducted and retained by the District an amount

equal to the maintenance and operation assessments that would have been levied upon the lands from which such rental is derived had the lands been in private ownership.

### IX.

Whenever land has been released from obligation pursuant to paragraphs I and II hereof, the said Trustee, shall make, execute and deliver to the owner of such land a release substantially in the form of Exhibit "C" hereto attached, which release shall be acknowledged so that it may be recorded in the records of the County of Siskiyou, State of California.

### X.

No segregation of the separately priced parcels shown in Exhibit "B" will be accepted and releases will only be executed for any entire parcel of land so separately described and price in Exhibit "B".

### XI.

It is further understood and agreed that the District will pay to the said Trustee, for the benefit of all of the bondholders, any and all moneys received by the said District by virtue of certain condemnation proceedings now in progress in the Courts of California for Siskiyou County. Such condemnation proceedings being for the purpose of acquiring certain lands of the District for use as an Army Air Field.

In Witness Whereof, the said W. E. Buell has hereunto set his hand the day and year first above

written and the Montague Water Conservation District has caused these presents to be executed and its seal hereto attached by its President and Secretary thereunto duly authorized, the day and year first above written.

W. E. BUELL

Montague Water Conserva-  
tion District

By SIDNEY O'CONNOR

President

ROY E. SWIGART

Secretary

This Is to Certify that William E. Buell, as trustee, has received from.....(a) the sum of \$.....in cash or (b) a mortgage upon the land hereinafter described for the sum of \$....., the receipt of which is hereby acknowledged.

payment

In consideration of the above delivery of mortgage and pursuant to the provisions of that certain contract dated ....., 19.. and entered into by and between William E. Buell and the Montague Water Conservation District and which contract was thereafter approved and confirmed by the District Court of the United States for California in a decree entered the.....day of....., 19.. in the case numbered..... entitled "In the Matter of the Montague Water Conservation District" and which decree has been filed in the records of the County Recorder of Siski-

you County, California, in Book . . . . ., Page . . . . .  
of official records of Siskiyou County.

The undersigned William E. Buell, acting on behalf of all of the present outstanding bond holders of the Montague Water Conservation District as provided in the decree of the District Court of the United States for California, just above mentioned, does by these presents forever release the hereinafter described real property, located in the boundaries of the Montague Water Conservation District from any liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District.

Land Description:

Dated this . . . . . day of . . . . ., 19 . . .

WILLIAM E. BUELL,

Trustee

By . . . . .

State of . . . . .

County of . . . . .ss.

On this . . . . . day of . . . . . 19 . . ., before me, a . . . . ., personally appeared . . . . ., known to me to be the person who signed the foregoing release and acknowledged to me that he signed the same as his free and voluntary act for the uses and purposes therein contained.

. . . . .  
. . . . .  
. . . . .



My commission expires.....

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH,

Clerk, District Court of the U. S. Northern District of California.

By F. M. LAMPERT

Deputy Clerk

[Endorsed]: Filed Dec. 10, 1943.

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In the United States District Court for the Northern District of California, Northern Division

In the Matter of

THE MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

PETITION FOR CONFIRMATION  
OF COMPOSITION

To the Honorable Martin I. Welsh, Judge of the Above-Entitled Court:

Comes now the Montague Water Conservation District, an irrigation district, organized under the laws of California, relating to the organization of Irrigation Districts and petitions the Court for a confirmation of the plan of composition, of its

bonded debt, attached hereto, under the provisions of Sections 81 to 84, inclusive, of the Bankruptcy Act of the United States and in support of this petition your petitioner alleges:

### I.

That the Montague Water Conservation District was organized in the year 1925 and has existed continuously since that date as an Irrigation District located wholly within Siskiyou County, California.

### II.

That on or about the 1st day of January, 1926, the said District caused to be issued and sold, in the manner provided by law, its coupon bonds in the total sum of \$1,395,000.00 and bearing interest at 6% per annum, which interest is evidenced by semi-annual interest coupons attached to each of said bonds, and such bonds being in denomination of \$1,000.00 and payable to bearer, and numbered consecutively from 1 to 1395 and maturing serially from 1947 to 1965.

### III.

That none of the principal of said bonds has been paid and interest coupons dated January 1, 1931, and subsequent are past due and unpaid on all of the above mentioned bonds except bonds numbered 276 to 295, inclusive, upon which interest coupons dated July 1, 1932, and subsequent are past due and unpaid.

### IV.

That said bonds and coupons above mentioned

are payable, according to the laws of California, from annual assessments levied upon the lands within the boundaries of the District; that the annual assessments required to meet the outstanding bonded indebtedness and the interest thereon are greater than the land owners can pay and the total outstanding debt of the district is much greater than the value of the lands within the district; that as a result a major portion of the lands within the District have been foreclosed by the District for failure to pay assessments and because of this situation the ability of the District to pay its obligations has been further reduced until it has become impossible, and the District is and has been for many years, insolvent and unable to meet its debts as they have matured, or will mature, making it imperative that the District effect a composition of its bonded debt in order to continue in existence.

#### V.

That a plan of composition of the bonded indebtedness of the District has been agreed upon between the District and Mr. W. E. Buell, representing 90.9% of the outstanding bonded debt and the interest thereon and such plan is attached hereto and is by these presents presented to the Court.

#### VI.

That by the execution of the attached plan of composition .909% of the creditors of the District have consented in writing to the plan of composition attached hereto.

## VII.

That the only indebtedness of the District affected by the plan of composition attached hereto is the outstanding bonded indebtedness described above and as a result there is only one class of creditor.

## VIII.

That a list of the known owners of the outstanding bonds of the District together with their addresses, where known, and the amounts of their claims is attached hereto, marked Exhibit 'A,' and by reference made a part of this petition. That such list shows separately those creditors who have accepted the plan of composition attached hereto and also those creditors who have not accepted the plan of composition.

## IX.

That the owners of the lands within the boundaries of the District are affected by the plan of composition attached hereto and therefore there is attached hereto marked 'B,' and by reference made a part hereof, a list of the known record owners, together with their addresses, of all the lands within the boundaries of the District affected by the plan of composition attached hereto.

Wherefore your Petitioner prays:

1. That the Court enter an order herein approving the petition and the filing thereof under the provisions of the Bankruptcy Act and directing that notice of these proceedings be given as re-



quired by the Bankruptcy Act and fixing a date of hearing upon this petition and

2. That upon the completion of the hearing an interlocutory decree be entered approving the plan and putting the same into effect and

3. That upon the completion of the plan of composition, a final decree be entered, discharging petitioner from all debts and liabilities in accordance with such plan and

4. That the Court grant such further orders, decrees and relief in the premises as may be required to complete the jurisdiction of the Court and as may be deemed just and equitable.

MONTAGUE WATER CON-  
SERVATION DISTRICT.

By SIDNEY O'CONNOR, .

President.

Attest:

[Seal] ROY E. SWIGART,

Secretary.

State of California,  
County of Siskiyou—ss.

Sidney O'Connor, being first duly sworn, deposes and says:

That he is the president of the Board of Directors of the Montague Water Conservation District; that

he has read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge, and that he is authorized by resolution of said Board of Directors to sign and verify the foregoing petition.

SIDNEY O'CONNOR.

Subscribed and sworn to before me this 9th day of December, 1943.

[Seal]

W. A. SIMON,

Notary Public in and for the County of Siskiyou,  
State of California.

## EXHIBIT "A"

LIST OF CREDITORS WHO HAVE CON-  
SENTED TO THE PLAN OF COMPOSI-  
TION:

Name	Amount
W. E. Buell, Agent 227 Sherlock Bldg. Portland, Oregon	\$1,265,000.00

LIST OF CREDITORS WHO HAVE NOT CON-  
SENTED TO THE PLAN OF COMPOSI-  
TION:

Name	Amount
Toledo Trust Co. Toledo, Ohio	\$ 50,000.00
Schaddelee & Co. 1028 Grand Rapids Nat'l. Bank Bldg. Grand Rapids, Mich.	40,000.00
American National Ins. Co. Galveston, Texas	15,000.00
Oscar Chesson Beaumont, Texas	12,000.00
Sarah Ford Hunter Brae Burn Bloomfield Hills, Mich.	10,000.00
Otto Landman 2225 Fulton St. Toledo, Ohio	3,000.00
Total	<hr/> \$1,395,000.00

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH,  
Clerk, District Court of the U. S., Northern District of California.

By F. M. LAMPERT,  
Deputy Clerk.

[Endorsed]: Filed Dec. 10, 1943.

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In the United States District Court for the Northern District of California, Northern Division

No. 10503

In the Matter of

THE MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

### INTERLOCUTORY DECREE

Now on this day this matter coming on for hearing before the Court upon the application of the Montague Water Conservation District for an interlocutory decree in this matter; and it appearing to the Court that the Special Master, appointed by this Court, has taken testimony and filed herein his findings of fact and recommendations, and it appearing from such findings and recommendations that the laws relating to this matter have been fully



complied with, and it further appearing that said findings should be approved and confirmed and the plan of composition filed herein should be approved and confirmed.

It Is Therefore Ordered Adjudged and Decreed that the plan of composition on file herein be and the same hereby is confirmed and approved and the parties hereto are hereby directed to put said plans in operation.

It Is Further Ordered, that the Court retain jurisdiction of this matter for the purpose of making such orders as may be required for carrying out the provisions of the plan.

Dated this 4th day of March, 1944.

MARTIN I. WELSH,

Judge of the United States  
District Court.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH,

Clerk, District Court of the U. S., Northern District of California.

By F. M. LAMPERT,

Deputy Clerk.

[Endorsed]: Filed March 4, 1944.



No. 11118

IN THE

**United States Circuit Court of Appeals**

For the Ninth District

W. E. BUELL,

*Appellant,*

vs.

SIMON NEWMAN COMPANY,

a California Corporation, *Appellee.*

APPELLANT'S OPENING BRIEF

J. EVERETT BARR,

Warren Building  
Yreka, California

*\* Attorney for Appellant.*

FILED

NOV 2 1945

PAUL P. O'BRIEN,  
CLERK





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**No. 11118**

IN THE

**United States Circuit Court of Appeals**

For the Ninth District

---

W. E. BUELL,

*Appellant,*

vs.

SIMON NEWMAN COMPANY,

a California Corporation, *Appellee.*

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**APPELLANT'S OPENING BRIEF**

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I.

**JURISDICTION**

This is an appeal to reverse the judgment made and entered by the United States District Court in and for the Northern District of California, Northern Division in favor of the appellee, the defendant in the lower court, and against the appellant, the plaintiff in the lower court. This action was instituted by the appellant as trustee for certain bondholders, he being appointed in a municipal bankruptcy proceeding pending in the District Court of the Northern

District of California, Northern Division. The jurisdiction of the District Court is based upon the fact that the plaintiff is a resident of the state of Oregon, 28 U.S.C. 41(1); that there is a federal question involved insofar as the District Court had to determine the authority of a trustee in bankruptcy, 28 U.S.C. 41(1), and the plaintiff, being a trustee in bankruptcy, was an officer of the United States Court, 28 U.S.C. 41(1). The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court is based on Title 28 U.S.C.A. 225 (a), and Rule 73 of the Federal Rules of Civil Procedure.

## II.

### STATEMENT OF THE CASE

The facts of this case are not in dispute and are substantially as follows:

The Simon Newman Company entered into a crop lease with the Montague Water Conservation District, the latter being an irrigation district located in Siskiyou County, California. The lease is set forth in the Transcript on Pages 5 to 8 inclusive. The pertinent portions thereof are that the District is to receive one-quarter of all the crops upon the leased land as rentals (T6) and the parties further agree that the lease was subject to the terms and conditions of a certain municipal deed regarding adjustment proceeding then pending in the Federal District Court (T7). Thereafter the appellant was appointed trustee by the court and a Plan of Composition was approved. The pertinent portion of this Plan of Composition was as follows: "All income from rents and royalties accruing after December 31, 1943 upon lands now owned by the District shall belong to the bondholders" (T16). Thereafter and in accordance with the Plan of Composition the appellee paid \$32,420.00 to the District for the release of the bonded

indebtedness against the leased land. These funds were delivered to appellant (T16) who in turn delivered the appellee a certain release set forth on Pages 11 to 13 of the Transcript. At the time of the payment of \$32,420.00, the crop of grain was approximately six inches high and no crops had been harvested upon the land and no crops were in a condition to be harvested. (T16) One quarter of the value of the crop when matured and harvested was \$3,327.00.

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### III.

#### SPECIFICATION OF ERRORS

A. The Court erred in not granting appellant's motion to strike.

B. The Court erred in finding that the release was a release of appellee's obligation to pay rent.

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### IV.

#### ARGUMENT

A. THE RELEASE PLEADED BY THE APPELLEE IS LIMITED TO THE CANCELLATION OF THE BONDED INDEBTEDNESS AND DOES NOT EFFECT THE CONTRACTUAL OBLIGATION BETWEEN APPELLANT AS ASSIGNEE OF THE DISTRICT AND APPELLEE AS THE LESSEE.

In California at least, a lease is more than a grant of interest in real property. It is also contractual in nature and is a contract between the lessor and lessee for possession and use of the property and for consideration of rent. (*Samuels v. Ottinger* (1915) 169 Cal. 209, 146 P. 638; *Chandler v. Hart* (1911) 161 Cal. 405, 119 P. 516; *Dean v. Brower* (1931) 119 Cal. App. 412, 6 P. (2d) 580). Because

of its dual nature, dual obligations are created: "... the lease has two sets of rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate', and the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract'." (*Samuels v. Ottinger, supra*, 169 Cal. 211; see also *Realty etc. Co. vs. Rea* (1920) 184 Cal. 565, 194 Pac. 1024; *Bonetti v. Treat* (1891) 91 Cal. 223, 27 P. 612). The lease is construed according to the rules for interpretation of contracts generally. (*Kurihara v. City Market* (1928) 90 Cal. App. 374, 265 P. 987; *Barron Estate Co. v. Waterman* (1916) 32 Cal. App. 171, 162 P. 410; *Lang v. Pac. Brewing etc. Co.* (1919) 44 Cal. App. 618, 187 P. 81).

A perusal of the release given by appellant shows that there is no release of a contractual obligation and no release running to any one in personam but that the release specifically releases certain lands from an obligation implied in law.

B. THE PURCHASE OF THE LAND DID NOT MERGE THE FEE AND THE RIGHT TO COLLECT THE RENT.

In order to determine the effect of the purchase of the land by the appellee we must determine the rights of the parties as of the date of the signing of the composition agreement and the signing of the lease. The composition agreement as we said above provides that all income from rents and royalties accruing after December 31, 1943 upon lands now owned by the district belongs to the bondholders; there is no question that these lands belonged to the district upon the date of the signing of the composition agreement and upon the date of its approval. It is set forth in the schedule attached to the agreement as belonging to the district; they belonged to the district after December 31, 1943 and until their purchase by Simon Newman Company in May of 1944.



At the time of the lease Simon Newman Company acknowledged that the lease was taken in contemplation of the composition agreement; at the time the lease was executed the rents began accruing. The word "accruing" defined in Black's Law Dictionary, Third Edition is as follows:

"ACCRUING. Inchoate; in the process of maturing. That which will or may, at a future time, ripen into a vested right, an available demand, or an existing cause of action. *Cochran v. Taylor*, 13 Ohio St. 382."

There is no question that the rents were in the process of maturing during the entire year 1944 both before and after the sale. There is no question but that rents may be assigned without the consent of the lease holder; Section 1111 of the Civil Code reads as follows:

"Grants or Remainders or Reversions - Attornment - Rent.—Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby. *Leg. H.* 1872."

*See also Dreyfus v. Hirt*, 82 Cal. 621; *Castro v. Barry*, 79 Cal. 443; *Title Ins. Etc. Co. v. Pfenninghausen*, 57 Cal. App. 655.

If a severance of the rents have been made it will not pass to the grantee by deed. *See cases cited in Delvin on Real Estate, Third Edition, Volume 2, Page 1613.* In addition as stated above, regardless of the question of severance, there was a contractual obligation which specifically contributed the composition agreement. The appellee is not an innocent purchaser, it went into this transaction with its eyes open; it knew that it was liable for the rent and the bondholders are entitled to the rent.

## CONCLUSION

In conclusion it may be said that the lower court apparently attempted to ascertain the intent of the parties by what it thought the contract should be rather than by ascertaining what the contract actually was, as shown by the written exhibits.

Dated, Yreka, California,

October 25, 1945.

Respectfully submitted,

J. EVERETT BARR,

*Attorney for Appellant.*

No. 11,118

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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W. E. BUELL,

*Appellant,*

VS.

SIMON NEWMAN COMPANY (a California  
corporation),

*Appellee.*

---

**BRIEF FOR APPELLEE.**

---

EDWARD F. TREADWELL,  
REGINALD S. LAUGHLIN,  
TREADWELL & LAUGHLIN,

530 Standard Oil Building, San Francisco 4, California,

*Attorneys for Appellee.*

FILED

NOV 15 1948

PAUL M. O'BRIEN,  
CLERK





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No. 11,118

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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W. E. BUELL,

*Appellant,*

VS.

SIMON NEWMAN COMPANY (a California  
corporation),

*Appellee.*

---

## BRIEF FOR APPELLEE.

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### I.

#### INSUFFICIENCY OF GROUNDS URGED FOR REVERSAL.

(1) The record as printed, (2) the statement of the case made by appellant, and (3) the specification of errors made by appellant, are insufficient to meet the decision of the District Court. The record as printed fails to set forth the plan of composition which forms one of the main grounds of the decision of the Court. The statement of the case fails to set forth the provision of the plan of composition on which the Court based its decision. The specification of errors only specifies the failure to strike the release (which is not argued) and the finding that the release did release the obligation to pay rent, and

entirely ignores the findings that there was under the facts no obligation of this land to pay any rent or any sum in excess of the purchase price designated in the plan of composition. Appellant's argument, therefore, not having covered matters decided by the District Court amply sufficient to sustain the judgment, the Court is not required to examine the matter further.

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## II.

### THE FACTS.

The facts are that under date of December 6, 1943, an agreement was entered into by W. E. Buell, representing the bondholders of Montague Water Conservation District, and Montague Water Conservation District. Simon Newman Company, the appellee here, was not a party to that agreement. That agreement set forth the amount that was to be paid on the bonded indebtedness and the amount that was to be paid by each parcel of land, and the particular land involved in this case was allotted the sum of \$32,420.85. (T. 28.) The agreement provided that the amount might be paid either in cash or by means of a note and deed of trust, and paragraph IX of the agreement provided that "Whenever land has been released from obligation pursuant to paragraphs I and II hereof, the said Trustee, shall make, execute and deliver to the owner of such land a release substantially in the form of Exhibit "C" hereto attached, which release shall be acknowledged so that it may be recorded in the rec-



ords of the County of Siskiyou, State of California." However, the agreement contemplated and recognized that certain of the land within the District might be owned by the District, having been acquired for non-payment of District assessments, and therefore paragraph III of the agreement provided that "upon the expiration of ninety days from the date of final confirmation of this contract by the United States District Court, as provided in paragraph III hereof, the District agrees to execute and deliver to the said Buell a deed to all non-operative property *then* standing in the name of the District". In connection with this type of land the agreement, in paragraph VIII, provided:

"All income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders, provided that if this contract shall not be approved by the United States District Court for the Northern District of California, such rentals, royalties and leases shall belong to the District. Also provided however that from such rental there shall be deducted and retained by the District an amount equal to the maintenance and operation assessments that would have been levied upon the lands from which such rental is derived had the lands been in private ownership."

It will be noted that there was no assignment of such rent to Buell. This particular land at the time of the confirmation of the plan belonged to the District, having been acquired for non-payment of District taxes, and on the 1st day of January, 1944, the Dis-

trict leased the land to Simon Newman Company. This lease provided for no cash rental, but provided for the delivery to the District, as lessor, of a certain proportion of the crop harvested. At the time of the lease there was a crop of grain planted on the property. This lease was entered into between the parties with full knowledge of the plan regarding the bonds, and was made subject thereto by the following provisions:

“It is further agreed and understood that this lease and agreement is executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lessor under the terms and conditions of a certain plan of Municipal Debt Readjustment, and petition for confirmation now on file in the United States District Court, for the Northern District of California, Northern Division and numbered 10503 therein. The lessor shall not be accountable for, nor liable to the lessee for any act on its part done in effecting or carrying out the terms and provisions of said plan nor of any act required of it to be done by order of Court in said proceedings.”

Under this plan the District took the position that it was entitled to sell any land in the District owned by it, provided the purchaser paid the amount that had been allotted against that land, at any time within 90 days after the confirmation of the plan, and therefore, within 90 days after the confirmation of the plan, and on May 27, 1944, the District sold and conveyed this particular property to Simon Newman Company

for the amount allotted against this land, to-wit, the sum of \$32,420.85, and this sum was paid to and accepted by W. E. Buell, as trustee for the bondholders, from Simon Newman Company, pursuant to the provisions of the contract dated December 6, 1943 (see certificate of release attached to answer of defendant). (T. 11-14.) The provision of the contract for such release obviously referred to the provisions which permitted a land owner to have his land released from further obligations to the bondholders by paying the specified sum, and it obviously had no reference to the provisions of the contract regarding lands which within 90 days after the confirmation of the plan were to be conveyed to the District together with rentals accruing after December 31, 1943, less District assessments.

At the time of this sale the grain crop was only about 6 inches high, and no crops of any kind had been taken off the land. At a later date the crop was matured and harvested by defendant and one-quarter of the crop as matured and harvested was of the value of \$3327.00.

---

### III.

#### **STATEMENT OF APPELLEE'S CONTENTIONS.**

1. The provision for the right to rents and royalties has no application to lands with respect to which the owners paid the allotted amount, but only to lands which within 90 days after confirmation of the plan



were conveyed by the District to the trustee for the bondholders. This land was not so conveyed.

2. The bondholders, by accepting payment and releasing the land pursuant to the terms of the plan, recognized the right of the District to sell the land within the 90-day period and the right of the purchaser of the land to pay the allotted amount, and completely ratified the act of the District in so selling the land.

3. Even if the provision as to rents and royalties applied to such lands, the right thereto, by the sale and conveyance of the land by the lessor to the lessee, was merged in the title which appellee acquired, and never accrued within the meaning of the plan.

4. Even if the provision regarding rents and royalties applied to land which paid the allotted amount, the plan did not amount to an assignment of such rental and appellant could not in this action sue therefor.

5. The lease did not provide for any cash rental, but only for a share of the crop, and if appellant has any right to the crop he has no right to recover cash, but could only recover his share of the crop itself, there being no allegation that the crop had in any way been converted by Simon Newman Company.

6. There is no merit in the objection to the release made by the appellant, as it is evidence of the receipt by Buell of the money and the admission by him that it was paid pursuant to the terms of the contract, and therefore constitutes a full ratification of the construc-



tion of the contract given by the District and the action of the District thereunder.

(All of these contentions were upheld by the District Court except Nos. 4 and 5 which were not passed upon.)

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#### IV.

##### ARGUMENT.

We think that a reading of the plan will convince the Court that the plan contained entirely different provisions with regard to lands which were required to be conveyed by the District within 90 days after the confirmation of the plan, and lands which were not so conveyed but were to be released upon payment of the allotted amount. This seems to be made particularly clear by subdivision (d) of paragraph III, which provides that "upon the expiration of ninety days from the date of final confirmation of this contract by the United States District Court, as provided in paragraph III hereof, the District agrees to execute and deliver to the said Buell a deed to all non-operative property THEN *standing in the name of the District*". Obviously, there was no obligation of the District to convey to Buell land which *at that time* was not standing in the name of the District but had been conveyed by the District to other persons. It is apparent from the release which Buell gave that the District saw to it that the full amount of the purchase price was actually paid to Buell, and that the purchase price was the full amount

allotted against these lands. If the plan did not authorize the sale of the land by the District within 90 days, or if there was any ambiguity in the contract in that regard, the action of Buell in certifying that the payment was made pursuant to the terms of the contract was a complete ratification by him of the action of the District, and constitutes a contemporaneous construction by the parties of the meaning of the agreement. While it is true that paragraph VIII standing alone provides that "All income from rents and royalties accruing after December 31, 1943 upon lands *now* owned by the District shall belong to the bondholders", it is clear from the entire agreement that this had reference to lands that were within the 90-day period conveyed to Buell. No reason can be assigned why lands of this type, on which the bondholders received the full allotted amount, should also contribute rental, while other lands in private ownership, paying the allotted amount, should have no such liability.

Moreover, if the contract is to be constructed as permitting a sale of the land within the 90-day period and upon payment of the allotted amount, the parties must be deemed to have contracted with reference to the legal effect of such transaction. The legal effect of the conveyance was obviously to merge in the title acquired by Simon Newman Company any claim of the District to rentals which would thereafter accrue.

10 *Cal. Jur.*, Estates, Sec. 10, p. 606;  
*Jameson v. Hayward*, 106 Cal. 682;

*Erving v. Jas. H. Goodman Bank*, 171 Cal. 559;

*Landis Brothers Co. v. Lawrence*, 104 Cal. App. 499;

*Ito v. Schiller*, 213 Cal. 632.

If the right of the District to those rentals merged in the title which Simon Newman Company acquired, the District could certainly not claim the same from Simon Newman Company when they accrued, and it is perfectly clear that paragraph VIII of the agreement does not amount to an assignment of those rentals by the District to Buell. Reading the entire provision, it only amounts to an indication that rents accruing to the District, after deducting from them an amount equal to the maintenance and operation assessments, would belong to Buell. There is no evidence here as to the amount of such assessments, and it is impossible to determine the amount of those rentals to which Buell would become entitled. Moreover, we submit that the contract did not obligate the District to turn over to Buell rentals to which the District never became entitled. If a rental had been due and payable to the District prior to the time it sold the land, the right thereto would have accrued and would not be merged in the deed, but this rental could not accrue under the terms of the lease until the crop was grown and harvested. We submit that the word "accrue" evidently referred to some rent or royalty that would actually accrue to the District. It certainly had not accrued when



the crop was only 6 inches high and had neither been matured nor harvested.

If the District had assigned to Buell all rents to which the District might during the life of the lease become entitled, we would have an entirely different situation. But here, in the first place, there was no assignment of any kind, but only an indication of some interest, to be determined upon an accounting, in rentals which should actually accrue to the District. This rental never accrued to the District, and the agreed statement of facts provides that "Montague Water Conservation District makes no claim against Simon Newman Company for any rent under said lease". (T. 16-17.) But even if there had been an assignment of the rent, this would not have prevented a merger, in view of the rule laid down in *Erving v. Jas. H. Goodman Bank*, 171 Cal. 559. In that case there was an assignment of the rent, and it was contended that this prevented the operation of the doctrine of merger, but the Court held that in taking the assignment the assignee was aware of a provision in the lease by which the lessee might become the purchaser of the property. Under these circumstances it was held that where he did become such purchaser the doctrine of merger would prevail against the assignee. So here, the same instrument which gives the appellant some right in the rent, when properly construed, authorizes the District to sell the land, and it having sold it and got it released, the doctrine of merger applied.



Moreover, we submit that the entire transaction shows that the appellant released not only the land, but Simon Newman Company as the owner of the land, from any further obligation to the bondholders. It is true that the certificate of release "does by these presents forever release the hereinafter described real property \* \* \* from liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District". It does not in so many words release Simon Newman Company from any such liability, but it does recite the payment by Simon Newman Company of the sum of \$32,420.85 and it recites that this was paid pursuant to the provisions of the plan. The plan certainly did not contemplate that the land would be released but that the owner of the land would not. In other words, the receipt of the money and the giving of the release was all on the supposition that this particular land was controlled by paragraphs I and II of the plan, and not by paragraphs III and VIII respecting lands which were to be conveyed by the District to Buell.

Counsel for appellant, in his brief, makes distinctions between obligations growing out of privity of contract, but while Simon Newman Company took subject to the plan, it was not a party thereto nor did it agree to pay any rents or royalties to the plaintiff. Counsel also refers to the severance of these rents from the land, but as we have pointed out, they never were severed because there never was any assignment by the District of the rents accruing under this contract. Any obligation for rental was an obligation to the District, and that obligation was merged

in the title which Simon Newman Company received from the District, with the complete consent and ratification of the appellant.

Obviously the provision of paragraph VIII set forth on page 3 hereof cannot be literally followed. That paragraph provides that all rents accruing after December 31, 1943, on all lands owned by the District, shall belong to the bondholders. If this is made to apply to lands which at the time of the agreement belonged to the District, but which by subsequent action of both parties were conveyed away, then the purchaser of those lands would be *perpetually* bound to pay all the rents accruing from any source from the land to the bondholders. In other words, there is no limit of time. As applied to land conveyed by the District within 90 days this was entirely logical, because no one after such a conveyance would be interested in rents thereafter accruing except the bondholders, as the owners of the land. But to construe this contract so that the bondholders would receive the allotted payment of \$32,420.85 and also be entitled to the perpetual right to the rents arising from the lands would be totally unreasonable, and such a contract should not and will not be construed so as to make it unreasonable, nor will it be construed contrary to the actions of both parties thereunder.

The construction of the plan of composition and of the release made by the trial Court was not unreasonable and will not be disturbed on appeal.

*Kautz v. Zurich General Ins. Co.*, 212 Cal. 576, 582.

## V.

## CONCLUSION.

This case is a test case, as the District sold within the 90-day period a large amount of land, and if appellant recovers in this case he will make a like claim against all other purchasers. It must be obvious to the Court that the District, in claiming the right under this agreement to sell this land, was influenced largely by a desire to get the land back into private ownership, and that any doubt as to its right to do so cannot now be raised by the appellant. It must be further obvious to the Court that the bondholders were entirely satisfied if they received one of two things: (1) the allotted payment, or (2) the land itself plus any rents that might accrue after December 31, 1943. The appellant has no right under the agreement to obtain both. In other words, he could not get the allotted amount and still claim the land also. No more can he claim the incidental rent arising out of the land after he has received the allotted amount.

We respectfully submit that the judgment should be affirmed.

Dated, San Francisco, California,  
November 14, 1945.

Respectfully submitted,

EDWARD F. TREADWELL,

REGINALD S. LAUGHLIN,

TREADWELL & LAUGHLIN,

*Attorneys for Appellee.*





No. 11119

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

HOUGHTON GIFFORD,

Appellant,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-  
TION OF AMERICA,

Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,  
CLERK



No. 11119

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United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Plaintiff and Appellant.

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BRONTE M. AIKINS, OLIVER B. WYMAN  
and PETER S. SOMMER,

625 Market Street,  
San Francisco, California.

Attorneys for Defendant and Appellee.

In the Superior Court of the State of California, in  
and for the City and County of San Francisco

No. 331970

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-  
TION OF AMERICA,

Defendant.

### COMPLAINT

Plaintiff complains of above named defendant,  
and for cause of action alleges and avers as follows:

#### I.

At all times herein mentioned defendant was and is a fraternal benefit society incorporated and licensed under the laws of the State of Missouri, and at all times herein mentioned was engaged in transacting business in the State of California.

#### II.

For a period of about fifteen (15) years prior to the [2\*] 3rd day of September, 1943, George Gifford was a Class "A" member of defendant, having during all of said period fully complied with all the terms and conditions of such a membership, and having fully paid all of the dues and assessments imposed upon him as a Class "A" member of defendant.

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

## III.

On or about the 9th day of May, 1932, there was issued and delivered by defendant to said George Gifford a certificate of membership wherein and whereunder said George Gifford was entitled to the benefits accruing to a Class "A" member of defendant, and whereby said defendant agreed to and did insure said George Gifford against any accident occurring to him from which a claim for benefits arose; that in and under said certificate of membership and insurance defendant agreed to insure and to pay the benefits accruing to said George Gifford in the case of the death of said George Gifford to this plaintiff, the son of said George Gifford.

## IV.

In and under and by virtue of said certificate of membership referred to and described in the preceding paragraph, defendant agreed to pay to this plaintiff as the beneficiary named in said certificate of membership the sum of Five Thousand Dollars (\$5,000.00) if the said member, George Gifford, were killed by accidental means, and if said George Gifford were at the time of his death a member in good standing and were killed by accidental means which independently of all other cause, through external, violent and accidental means, caused bodily injuries which solely and exclusively caused the death of said George Gifford.

## V.

Said George Gifford was at all times herein mentioned, up to the time of his death on September 3, 1943, a Class "A" member in good standing of said defendant, and had fully complied with all the rules, regulations, by-laws and constitution and other requirements of defendant.

## VI.

On or about the 3rd day of September, 1943, said George Gifford was killed by accidental means, which independently of all other causes, through external, violent and accidental means, caused bodily injuries to said George Gifford in the City and County of San Francisco, State of California, which said bodily injuries were the sole and exclusive cause of the death of said George Gifford on said 3rd day of September, 1943.

## VII.

Said external, violent and accidental means which caused the bodily injuries that solely and exclusively caused the death of said George Gifford were as follows: to-wit: On September 3, 1943, said George Gifford was attempting to extricate an automobile which was the property of said George Gifford, and which had become jammed against the front door of the basement garage in the premises then occupied by said George Gifford at 2949 Anza Street in the City and County of San Francisco; in such efforts to extricate and free said automobile said George Gifford secured a piece of lumber of the



dimensions of about 2x4 inches, and of a length of 4 feet; with said piece of lumber in his hand said George Gifford climbed over the right fender of said automobile and stepped upon the right running board of said automobile; [4] upon stepping on said running board the right front door of said automobile suddenly and unexpectedly, and without the knowledge or observation of said George Gifford, flew open and struck said George Gifford a sharp, severe and violent blow on his skull in the vicinity of his left ear; and immediately upon receiving said blow from said door said George Gifford was knocked down and fell to the floor of the garage, became unconscious, and died within one hour as a direct result of said blow.

### VIII.

Plaintiff has fully complied with all of the terms and conditions of said certificate of membership described in Paragraph III hereof, and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford as above described, and demanded payment of the \$5,000.00 insurance provided for in said certificate of membership heretofore described.

### IX.

Defendant has refused payment of said sum, or any part thereof, and the same, and all thereof, remains due, owing and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of Five Thousand Dollars

(\$5,000.00) with interest at the legal rate from the 3rd day of September, 1943, together with his costs of suit incurred herein, and for such other, further and different relief as, the premises considered, is proper.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Plaintiff. [5]

State of California

City and County of San Francisco—ss.

Houghton Gifford, being first duly sworn, deposes and says:

He is the plaintiff named in the foregoing Complaint; he has read the foregoing Complaint and knows the contents thereof; the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

HOUGHTON GIFFORD

Subscribed and sworn to before me this 1st day of September, 1944.

[Seal]

ROBERT H. RUSCH

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 1, 1944. [6]

(Here follows Notice of Removal from the Superior Court of the State of California, in and for the City and County of San Francisco to the District Court of the United States in and for the Northern District of California, Southern Division, Removal Petition and Removal Bond) [7]

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[Title of Superior Court and Cause.]

ORDER REMOVING CAUSE TO FEDERAL COURT

Upon reading and filing the petition of The Travelers Protective Association of America, the defendant in the above entitled action, and upon filing the Bond, and good and sufficient sureties having been offered by the said defendant in the premises, and the same being by me, the Judge of the Superior Court, duly accepted, and it further appearing and being proved that written notice of said Petition and Bond for Removal has been duly given the plaintiff in said action prior to filing the same, as required by law,

It Is Hereby Ordered that no further proceedings be had in this cause and the removal of the same to the District Court of the United States in and for the Northern District of California, Southern Division thereof, be and the same is hereby [8] allowed and ordered in accordance with the afore-said Petition and the Statute of the United States in such case made and provided, and the Clerk of

this Court is hereby directed and ordered to furnish and deliver to the said defendant, upon its demand and the payment by it of the said Clerk's legal fees, a certified copy of the record and proceedings in this cause.

Dated this 28 day of September, 1944.

THOS. M. FOLEY

Judge of the Superior Court.

[Endorsed]: Filed Sept. 28, 1944. [9]

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[Title of Superior Court and Cause.]

#### CERTIFICATION OF RECORD

State of California,

City and County of San Francisco—ss.

I, H. A. van der Zee, County Clerk of San Francisco and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the annexed and foregoing is a true, full and correct copy of the original:

Complaint.

Notice of Removal.

Removal Petition.

Removal Bond.

Order Removing Cause to Federal Court.

in the above entitled action, and that the foregoing constitutes [10] a certified copy of the record in the above entitled action and of the whole thereof on file in my office.



Dated: October 13, 1944

[Seal]                      H. A. VAN DER ZEE  
                                    Clerk

                                    H. BRUNNER  
                                    Deputy Clerk

[Endorsed]: Filed Oct. 27, 1944. [11]

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[Title of Court and Cause.]

NOTICE OF FILING TRANSCRIPT OF  
RECORD

To the above named Plaintiff, and to Messrs. Dunne  
& Dunne, and J. D. Lederman, his Attorneys:

You, and each of you, will please take notice  
that on the 28th day of September, 1944, the above  
entitled cause was duly transferred from the Su-  
perior Court of the State of California, In and  
For the City and County of San Francisco, to the  
District Court of the United States, In and For  
the Northern District of California, Southern Divi-  
sion, and that a certified copy of the Record in  
said cause was filed in said District Court of the  
United States on the 27th day of October, 1944.

GAVIN McNAB, SCHMULO-  
WITZ, AIKINS, WYMAN &  
SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant

Receipt of a copy of the foregoing Notice is acknowledged this 27th day of October, 1944.

DUNNE & DUNNE

J. D. LEDERMAN

Attorney for Plaintiff

[Endorsed]: Filed Oct. 31, 1944. [12]

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In the District Court of the United States, in and  
for the Northern District of California, South-  
ern Division

No. 23911-G

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-  
TION OF AMERICA,

Defendant.

NOTICE OF MOTION FOR A SUMMARY  
JUDGMENT DISMISSING PLAINTIFF'S  
COMPLAINT WITH PREJUDICE

To: Houghton Gifford, plaintiff, and to Messrs.  
Dunne & Dunne and J. D. Lederman, his attor-  
neys—

You, and Each of You, Are Hereby Notified that  
the defendant in the above-entitled action will on  
the 20th day of November, 1944, at the hour of  
10:00 o'clock A. M. of [13] said day or as soon

thereafter as counsel can be heard, before the Honorable Louis E. Goodman, judge of the above-entitled court, at its courtroom in the United States Courts and Post Office Building, 7th and Mission Streets, San Francisco, California, move the above-entitled court for an order or orders designated a Summary Judgment in favor of the defendant dismissing plaintiff's complaint on file herein with prejudice. The said motion will be made upon the grounds and for the reasons that the defendant is entitled to a summary judgment in favor of the defendant, dismissing plaintiff's complaint on file herein with prejudice. The said motion will be made upon the grounds and for the reasons, among others, that the alleged cause of action has become barred and that the claim has lapsed by reason of the failure on the part of the plaintiff to commence any action against the above-named defendant in respect of his alleged claim arising under the Certificate of Membership or the Constitution and By-Laws of the defendant within six (6) months after the refusal of the defendant to pay plaintiff's claim, and by reason thereof the defendant is entitled to a summary judgment as a matter of law and that if the above-entitled case were tried by a jury the court would be constrained to direct a verdict for the defendant without submitting the case to the jury; and that it affirmatively appears from the plaintiff's complaint and from the affidavit of defendant filed concurrently herewith and from all of the records, pleadings and files in the above-entitled action that the plaintiff cannot state

or prove any claim against this defendant upon which any relief can be granted and that the lapse of more than six months after the refusal of this defendant to pay plaintiff's claim is conclusive evidence against the validity of said claim. The within motion will be presented in pursuance of the authority granted under Rule 56 (b) of the Rules of Civil [14] Procedure and will be based upon plaintiff's complaint, the within notice of motion, the affidavit of the defendant filed and served concurrently herewith, and all of the records, pleadings and files in the above-entitled action.

Dated: October 31st, 1944.

GAVIN McNAB, SCHMULOWITZ,  
WITZ, AIKINS, WYMAN &  
SOMMER,

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 31, 1944. [15]

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[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT AND TO  
MAKE THE COMPLAINT MORE DEFINITE  
AND FOR A BILL OF PARTICULARS

Comes now the defendant in the above-entitled action and moves the court as follows:



(A) To dismiss the complaint in the above-entitled [16] action because the complaint fails to state a claim against this defendant upon which any relief can be granted.

(B) To dismiss the complaint in the above-entitled action because it appears from said complaint and the supporting affidavit of the defendant filed concurrently herewith that plaintiff's alleged cause of action is barred by virtue of the terms, covenants and provisions of the contract entered into by and between George Gifford and this defendant.

(C) In the event that the complaint is not dismissed for the foregoing reasons, or either of them, then the plaintiff be required to file and serve a more definite statement of matters in respect of his complaint, or for a bill of particulars of the following matters referred to in said complaint, all of which are not available with sufficient definiteness or particularly to enable this defendant properly to prepare its responsive pleading or to prepare for trial.

All references to the numbered paragraphs hereinafter set forth relate to the similarly numbered paragraphs of the complaint. All references to George Gifford will be made to him by reference to him as "insured."

1. Relating to Paragraph III: a statement disclosing the claims of the plaintiff as to the exact terms, covenants and conditions of the Certificate of Membership issued and delivered by the defendant to the said insured on or about May 9, 1932,

and in the event that the said Certificate of Membership refers to the Constitution, By-Laws and Articles of Incorporation of The Travelers Protective Association of America, then disclose the full text of the Constitution, By-Laws and Articles of Incorporation, particularly the full text of Section 7 of Article XII of the Constitution and By-Laws.

2. As to Paragraph IV: a statement setting forth the [17] claims of the plaintiff as to whether the agreements of the defendant in, under and by virtue of the Certificate of Membership as set forth in said Paragraph IV comprise all of the agreements of the defendant, and, if not, set forth the full text representing all of the agreements of the defendant.

3. As to Paragraph VI:

(a) A statement disclosing what bodily injuries the insured received on September 3, 1943;

(b) A statement disclosing whether there were any other causes that contributed to the death of the insured besides the alleged but unidentified bodily injuries referred to therein.

4. As to Paragraph VII:

(a) A statement disclosing whether the conduct described in this paragraph on the part of the insured was voluntary;

(b) A statement disclosing whether the conduct of the insured as described in this paragraph was necessary;

(c) A statement disclosing whether at the time of the conduct described in this paragraph the

insured had any bodily or mental infirmity or disease;

(d) A statement as to whether or not at or about the time of the alleged injuries the insured had any visible marks of injury upon his body;

(e) A statement disclosing what precise bodily injuries the insured received as the result of the alleged blow on his skull;

(f) A statement as to what the age of the insured was at the time he received the alleged bodily injuries;

(g) A statement as to whether there was any coroner's inquisition into the circumstances attending the death of said insured and, if so, what was the result of said inquisition.

5. As to Paragraph VIII: [18]

(a) A statement of how or in what manner the plaintiff complied with all of the terms and conditions of the Certificate of Membership and when alleged compliance was made and what provisions of the Certificate of Membership related thereto;

(b) A statement as to whether plaintiff's notification to the defendant of the death of said insured and plaintiff's demand of payment were oral or in writing and, if in writing, when and in what form said notice and demand were made.

6. As to Paragraph IX: A statement from the plaintiff as to when the defendant refused the payment of the sum of \$5,000.00, and also as to the form in which said refusal was made, and, if in writing, then set forth the writing in haec verba,



including the time of the receipt of said refusal by the plaintiff.

(D) Said defendant will further move for an order directing that as to such paragraphs of this motion or any items thereof as to which the plaintiff shall state in his bill of particulars that he has no knowledge or information, or incomplete knowledge or information, then plaintiff shall be required to furnish this defendant in his bill of particulars whatever knowledge or information he may have or furnish further particulars within ten (10) days after he has obtained further knowledge or information, and in any event not later than thirty (30) days before trial.

(E) And said defendant will further move for an order extending the time of the defendant to answer the complaint until thirty (30) days after service upon the attorneys for this defendant of a copy of the more definite statement and of the bill of particulars directed to be furnished by the order to be entered upon this motion. Or, in the event that this motion in its entirety or the part thereof seeking a more definite statement and a bill of particulars be denied in all respects, then until thirty [19] days after service upon the attorneys for this defendant of a copy of the order denying such motion with notice of entry thereof.

(F) Defendant will further move for an order



granting to it such other and further relief as may be deemed just and proper in the premises.

GAVIN McNAB, SCHMULOWITZ  
WITZ AIKINS, WYMAN &  
SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 31, 1944. [20]

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[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT TO MAKE COMPLAINT MORE DEFINITE AND FOR A BILL OF PARTICULARS

To: Houghton Gifford, Esquire, Plaintiff, and to Messrs. Dunne & Dunne and J. D. Lederman, his attorneys—

You and Each of You Are Hereby Notified that the defendant in the above-entitled action will on the 20th day of [21] November, 1944, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, before the Honorable Louis E. Goodman, judge of the above-entitled court, at its courtroom in the United States Courts and Post Office Building, Seventh and Missions Streets in San Francisco, California, move the above-entitled court for an order or orders for the dismissal of the complaint and for an order

directing plaintiff to furnish a more definite statement and a bill of particulars with respect to each and every of the matters set forth in the motions attached hereto and made a part hereof. The said motions will be made upon the grounds and for the reasons that the moving defendant is entitled to present the aforesaid motions under the Rules of Civil Procedure, to wit, Rule 12 Subdivisions (a), (b) and (e) and will be based upon the complaint herein, the within motion and notice thereof and all of the records, pleadings and files in the above-entitled action, together with the affidavit of T. G. Hagaman, a copy of which is annexed.

Dated: October 31, 1944.

GAVIN McNAB, SCHMULOWITZ, AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.) [22]

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[Title of District Court and Cause.]

AFFIDAVIT OF T. G. HAGAMAN, ASSISTANT SECRETARY OF TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

State of Missouri

City of St. Louis—ss.

T. G. Hagaman, being first duly sworn, deposes and says: [23]

That he is an officer, to wit, the Assistant Secretary of The Travelers Protective Association of America, the defendant herein, and that he makes this affidavit on its behalf. Affiant avers that the defendant in the above-entitled action duly issued its Class A Certificate of Membership to George Gifford on or about May 9, 1932, and that attached hereto marked Exhibit "A" and by such reference made a part hereof is a full, true and correct copy of said certificate.

Affiant avers that attached hereto, marked Exhibit "B" and by such reference made a part hereof is a full, true and correct copy of the Articles of Incorporation, Constitution and By-laws of The Travelers Protective Association of America in full force and effect on or about September 3, 1943, which said date is alleged in Paragraphs VI and VII of plaintiff's complaint to be the date on or about which the said George Gifford allegedly received bodily injuries allegedly causing his death.

Affiant avers that heretofore and prior to December 21, 1943, plaintiff herein made a claim against the defendant and that said plaintiff asserted said claim as the beneficiary of the aforesaid Certificate of Membership marked Exhibit "A" and that thereafter this defendant refused to pay the said claim and notified the plaintiff in writing of the refusal of the defendant to pay the said claim of plaintiff, and that the plaintiff received the said notice of refusal of the defendant to pay the same



on or about December 27, 1943, and that attached hereto, marked Exhibit "C" and by such reference made a part hereof, is a full, true and correct copy of the said notice of refusal.

That at all times since May 9, 1932 there has been and there now is in full force and effect as part of the Constitution and By-laws of The Travelers Protective Association of America [24] Article XII, Section 7 thereof, which reads as follows:

"Limitations for Suits

Sec. 7. No action against this Association for the recovery on any claim arising under the Certificate of Membership or the Constitution and By-Laws shall be sustained unless commenced within six months after the refusal of this Association to pay the same and a lapse of such period shall be conclusive evidence against the validity of such claim asserted if an action for its enforcement be subsequently commenced."

Affiant avers that no action was commenced by the plaintiff against the defendant, The Travelers Protective Association of America, in respect of the aforesaid claim other than the above-entitled action and that said action was commenced in the Superior Court of the State of California in and for the City and County of San Francisco on September 1, 1944, more than six months after the refusal of the defendant and the written notice



thereof to the plaintiff to pay said claim as herein set forth.

T. G. HAGAMAN

Asst. Sec'y.

Subscribed and sworn to before me this 10th day of October, 1944.

[Seal] K. C. McLAUGHLIN

Notary Public in and for the City of St. Louis,  
State of Missouri.

My Commission Expires December 12, 1946. [25]

### EXHIBIT "A"

#### Class "A" Certificate of Membership

The Travelers Protective Association of America, Incorporated and Licensed Under the Laws of the State of Missouri as a Fraternal Benefit Society.

Members All Over the U. S. A.

By This Certificate of Membership, Certifies that George Gifford is a Class "A" member of said The Travelers Protective Association of America, and is entitled to such benefits as may be provided for Class "A" members in and by the Constitution, By-Laws and Articles of Incorporation of said Association in force and effect at the time any accident occurs from which a claim for benefits arises.

Benefits in case of death payable to Houghton Gifford his son. This Certificate, the Constitution, By-Laws and Articles of Incorporation of said As-

sociation, and Application for Membership, signed by said member, and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits and any changes., additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made shall bind said member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to, and were in force at the time of said member's application for membership.

In Witnes Whereof, this Association has caused this Certificate to be signed by its President and Secretary under the seal of the Association at St. Louis, Mo., this 9th day of May A. D. 1932.

Any member meeting with an accident must notify the Secretary-Treasurer at St. Louis Mo., in writing within thirty days of such accident, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice. In case of failure to notify except because of unconsciousness or physical inability the member or his beneficiaries shall forfeit all rights to insurance benefits.

No. 36827

T. S. LOGAN

Secretary.

WM. E. WELLMANN

President.

The following benefits are provided for Class "A" members or their beneficiaries, each subject to the conditions, exceptions and limitations of the constitution of this Association and amendments thereto, whenever a member in good standing shall, independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death or disability:

1. \$10,000 if killed by accidental means as the result of a wreck, collision or derailment while riding as a passenger, inside a passenger car, on a passenger train propelled by steam, or moved by electricity, at the steam railroad's terminal only, or over an electrified section of such steam railroad only.

2. \$5,000 if killed by accidental means.

3. \$5,000 for the loss of both legs or both arms by severance by accidental means.

4. \$2,500 for the loss of one hand or one foot by severance above wrist or ankle by accidental means.

5. \$1,300 in case of loss of four fingers of either hand by severance by accidental means.

6. \$5,000 in case of loss of both eyes by accidental means.

7. \$1,250 in case of loss of one eye by accidental means.

8. \$25 per week for total disability, not exceeding 104 weeks, by accidental means.

9. \$12.50 per week for partial disability, not exceeding five weeks, by accidental means.

Art. XIV, Sec. 1. Any member in good standing, wishing to change his beneficiary, shall be entitled on the surrender of the certificate of membership then in force and upon the payment of a certificate fee of fifty cents to the Secretary-Treasurer (said fee to be credited to the Expense Fund) except in the event of death of the beneficiary or the marriage of the member, this charge shall be remitted, to have a new certificate of membership issued, payable to such qualified beneficiary or beneficiaries as he shall direct. The surrender of the certificate of membership shall be waived provided the member at whose instance it was issued shall furnish satisfactory proof that the same has been lost or destroyed.

No. 36827

Class "A" Certificate of Membership in The  
Travelers Protective Association of America,  
St. Louis, Mo.

Issued to George Gifford, Neb. Division.

Dated May 9 1932

In case of injury, fatal or disabling, written notice within thirty days from date of injury must be furnished the Secretary-Treasurer of The Travelers Protective Association of America, at 3755 Lindell Blvd., St. Louis, Mo.



EXHIBIT "C"

December 21, 1943

Mr. Houghton Gifford  
139 Hugo Street  
San Francisco (8), California.

In re: George Gifford, Deceased  
No. 36827

Dear Sir:

Upon receipt of the notice of your father's death this Association, in accordance with the request made by your mother, investigated the facts in reference thereto.

This Association provides benefits for the beneficiaries of its members in those cases where death is due to external, violent and accidental means independently of all other causes. Liability is expressly excluded where death is caused wholly through any bodily or mental infirmity or disease. The conclusion reached by the pathologist who performed the autopsy is that your father's death was caused by "Coronary sclerosis with occlusion and myocardial failure. Angioma of the brain. Pyelonephritis." The official death certificate likewise discloses that death was "Death due to natural causes." Under the circumstances we regret to advise you that there is no liability on the part of

the Association and it regrets that it cannot be of service to you.

Sincerely yours

THE TRAVELERS PROTECTIVE  
ASSOCIATION OF AMERICA

(sgd.) By THEO. C. ABELE

Secretary

TCA:MPP:EP

(letter registered)

[Endorsed]: Filed Oct. 31, 1944 [28]

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[Title of District Court and Cause.]

MEMORANDUM DECISION ON MOTIONS TO  
DISMISS AND FOR SUMMARY JUDG-  
MENT.

The pleadings and record now before the court on defendant's motions to dismiss and for summary judgment demonstrate that plaintiff's cause of action is barred because of lapse of time as stipulated in the insurance contract.

However I am of the opinion that plaintiff should not at this stage of the litigation be deprived of the opportunity to plead by way of replication any pertinent facts in avoidance of the time limitation.

Accordingly the motion to dismiss is granted with leave to plaintiff to appropriately amend his complaint. (Rule 15 P.R.C.P.) [29]

Decision on the motion for summary judgment is reserved and the court will determine the same

after the amended complaint and such affidavits as defendant may desire to file are before the court.

Dated: January 29, 1945.

LOUIS E. GOODMAN

United States District Judge

[Endorsed]: Filed Jan. 29, 1945. [30]

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[Title of District Court and Cause.]

To Houghton Gifford, Plaintiff above named, and  
To Messrs. Dunne & Dunne and J. D. Leder-  
man, his Attorneys::

You and each of you will please take notice that the Honorable Louis E. Goodman, Judge of the United States District Court, did on the 29th day of January, 1945, grant defendant's motion to dismiss plaintiff's complaint with leave to plaintiff to amend his complaint if he be so advised, reserving the Court's decision on defendant's motion for summary judgment until after the filing of the amended complaint by plaintiff if he be so advised, within ten days, and such affidavits as defendant may desire to file within ten days thereafter if said defendant be so advised. [31]

Dated: February 1, 1945

GAVIN McNAB, SCHMULOWITZ, AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER,

Attorneys for Defendant

[Endorsed]: Filed Feb. 2, 1945. [32]

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In the District Court of the United States in and for the Northern District of California, Southern Division

No. 23911-G

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,

Defendant.

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

The motion of the defendant for a summary judgment in its favor and dismissing plaintiff's complaint with prejudice coming on regularly for hearing, and due notice thereof having been given; and

It Appearing that contemporaneously with the said motion for a summary judgment the said defendant moved to dismiss plaintiff's complaint, and



that the above entitled Court did, on January 29, 1945, grant defendant's motion to dismiss plaintiff's complaint, with leave to plaintiff to amend his [33] complaint, if he be so advised; and

It Further Appearing that the above entitled Court did reserve its decision on the defendant's aforesaid motion for a summary judgment until after the filing of the amended complaint by plaintiff, if he be so advised within ten days; and

It Further Appearing that the plaintiff in the above entitled action did receive notice of the rulings of the above entitled court as above set forth on February 1, 1945, and that said plaintiff has not filed any amended complaint within ten days from and after February 1, 1945; and

It Further Appearing that the defendant is entitled to have its motion for a summary judgment granted upon the ground that it is entitled to a judgment dismissing plaintiff's complaint, as a matter of law, for the reason that plaintiff's cause of action is barred because of the lapse of time as stipulated in the contract of insurance referred to in plaintiff's complaint;

It Is Accordingly Adjudged that the complaint in this action be and it is hereby dismissed with prejudice upon the ground that there is no genuine issue as to any material fact, and upon the further ground that the alleged cause of action set forth in plaintiff's complaint has become barred, and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant in respect of his alleged

claim arising under the certificate of membership, and the constitution and bylaws of the defendant within six months after the refusal of the defendant to pay plaintiff's claim; and

It Is Further Adjudged that the defendant, The Travelers Protective Association of America, a corporation, recover [34] of and from the plaintiff, Houghton Gifford, the sum of \$....., representing its costs as taxed, and have execution issue therefor.

Dated February 14, 1945.

LOUIS E. GOODMAN

Judge of the District Court

[Endorsed]: Filed Feb. 14, 1945. [35]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Houghton Gifford, the plaintiff above named, hereby gives notice that he does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment dated, filed and entered in the above entitled action on February 14, 1945 by the above entitled Court and from each and every part thereof.

Dated May 14, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Houghton Gifford, the Plaintiff and Appellant

[Endorsed]: Filed May 14, 1945. [36]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

(1) That said Judgment entered by the above entitled Court on the 14th day of February 1945 is erroneous, wherein it declared that the defendant was entitled to have its Motion for Summary Judgment granted and that it was entitled to a Judgment Dismissing Plaintiff's Complaint as a matter of law, for the reason that Plaintiff's Cause of Action is barred because of the lapse of time as stipulated in the contract of insurance referred to in Plaintiff's Complaint.

(2) That said Judgment of February 14, 1945, is erroneous wherein it dismisses with prejudice the Plaintiff's Complaint upon the ground that there is no genuine issue as to any material fact and upon the further ground that the alleged cause of action set forth in Plaintiff's Complaint had become barred, and that the claim had lapsed by reason of the failure on the part of Plaintiff to commence any action against the above named Defendant in respect of his alleged claim arising under the certificate of membership and the Constitution and By-Laws of the Defendant within six months after the refusal of the Defendant to pay Plaintiff's claim. [37]

(3) That said judgment of February 14, 1945 is erroneous in that it seeks to and does attempt to bind the Plaintiff by its Articles of Constitution and By-Laws, even though the Plaintiff was not a member of the Defendant's Association.



(4) Said judgment of February 14, 1945 is erroneous in that it gives the Constitution and By-Laws of Defendant the effect and dignity and legal force of a statute of limitation, which is contrary to the law and the decisions of the Courts.

(5) That said judgment of February 14, 1945 is erroneous and contrary to the law in that it disregards the allegations of the Complaint, which on a Motion to Dismiss, and on a Motion for Summary Judgment must be deemed to be true and must be construed most favorably in favor of the Plaintiff.

(6) That said Judgment of February 14, 1945 is erroneous in that it dismisses the Complaint with Prejudice, and that said Judgment is also erroneous in granting a Summary Judgment in favor of the Defendant in the absence of any Answer having been made and filed by the Defendant herein.

Dated: at San Francisco, California, this 23rd day of May, 1945.

Respectfully submitted

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for Appellant

Receipt of a copy of the within Statement of Points on which Appellant intends to reply, is hereby acknowledged this 23rd day of May, 1945.

SCHMULOWITZ, McNAB, WY-  
MAN, AIKINS & SOMMERS

Attorneys for Appellee

[Endorsed]: Filed May 24, 1945. [38]



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Comes now Houghton Gifford, Appellant herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure designates the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said Appeal was heretofore filed herein on the 14th day of May 1945, viz:

(1) Appellant's verified Complaint, dated September 1, 1944, which said Complaint was filed originally in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered 331,970.

(2) Order removing cause to Federal Court, dated September 28, 1944.

(3) Notice of filing of transcript of the record setting forth that the above entitled cause was duly transferred from the Superior Court of the State of California, in and for the City and County of San Francisco, to the above entitled Court, which said Notice is dated October 27, 1944. [39]

(4) Notice of Motion to Dismiss Complaint, to make Complaint more definite and for a Bill of Particulars, and the affidavit of T. G. Hagaman, verified October 10, 1944; the said Notice of Motion being dated October 31, 1944; save that there need not be copied in said affidavit the said Exhibit "B" attached to said affidavit, being the Articles of Incorporation, Constitution and By-Laws of The

Travelers Protective Association of America, it being stipulated, however, that both parties may refer to any portion of said Exhibit and incorporate such portions in their Briefs.

(5) Notice of Motion for a Summary Judgment dismissing plaintiff's Complaint with Prejudice, dated October 31, 1944.

(6) Motion to Dismiss Complaint and to make Complaint more definite and for a Bill of Particulars, dated and filed herein October 31, 1944.

(7) Memorandum Decision on Motions to Dismiss and for Summary Judgment, dated January 29, 1945, and filed herein on that date.

(8) Judgment on Motion for Summary Judgment, dated and filed herein on February 14, 1945.

(9) Notice of Appeal of Plaintiff filed May 14, 1945.

(10) A copy of this designation.

(11) A copy of Plaintiff's Statement of Points on which appellant intends to rely, filed herein with this designation.

Dated at San Francisco, California, this 23rd day of May, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

Receipt of a copy of the within Designation of

Contents of Record on Appeal is hereby acknowledged this 23rd day of May, 1945.

SCHMULOWITZ, McNAB, WY-  
MAN, AIKINS & SOMMER  
Attorneys for Appellee [40]

[Endorsed]: Filed May 24, 1945. [41]

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[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF ADDI-  
TIONAL PORTIONS OF RECORD ON  
APPEAL

Comes now The Travelers Protective Association of America, respondent herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure designates the following as additional portions of the record, proceedings and evidence to be included in the Record on Appeal:

1. Memorandum decision on motions to dismiss and for summary judgment dated and filed herein on January 29, 1945.

2. Notice to plaintiff and Messrs. Dunne & Dunne and J. D. Lederman, his attorneys, from Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer that the Honorable Judge Louis E. Goodman on January 29, 1945, granted defendant's motion to dismiss with leave to plaintiff to amend, reserving the Court's decision on defendant's motion for summary judgment until after [42] filing of amended complaint by plaintiff dated February 1, 1945 and filed herein on February 2, 1945.

3. Exhibits "A" and "C" attached to the affidavit of T. G. Hagaman, verified October 10, 1944.

4. That Exhibit "B" attached to the affidavit of T. G. Hagaman, verified October 10, 1944, be copied for annexation in the Record on Appeal, unless in lieu thereof counsel for appellant offer to stipulate that they will secure an order from the District Court of the United States in and for the Northern District of California Southern Division to transfer said original Exhibit "B", attached to said affidavit, to the United States Circuit Court of Appeals for the Ninth Circuit and that after transfer of said record to the United States Circuit Court of Appeals for the Ninth Circuit said appellant will stipulate that said United States Circuit Court of Appeals for the Ninth Circuit may consider said Exhibit "B" in its original form and further stipulate that counsel for respondent will furnish six (6) printed copies of said Exhibit "B" for said Court's use and consideration.

5. A copy of this designation dated at San Francisco, California, this 26th day of May, 1945.

Respectfully submitted,

GAVIN McNAB, SCHMULOWITZ,

AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

PETER S. SOMMER

Attorneys for Respondent

Receipt of a copy of the within Respondent's Designation of Additional Portions of Record on



Appeal is hereby acknowledged this 26 day of May, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

[Endorsed]: Filed May 28 1945. [43]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO  
FILE RECORD ON APPEAL

Good Cause Appearing, It Is Hereby Ordered that plaintiff and appellant be, and he is hereby, granted to and including the 15th day of July, 1945, within which to file his record on appeal and to docket said action in the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that the Clerk of the District Court shall include a copy of this Order in the record on appeal in the above entitled matter.

Done in Open Court this 20th day of June, 1945.

LOUIS GOODMAN

United States District Judge.

[Endorsed]: Filed June 20, 1945. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE  
RECORD ON APPEAL.

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including August 11, 1945 to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 14, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 14, 1945. [45]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 45 pages, numbered from 1 to 45, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Houghton Gifford, Plaintiff, vs. The Travelers Protective Insurance Association of America, Defendant, No. 23911 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$4.85 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 31st day of July A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By M. E. VAN BUREN

Deputy Clerk [46]

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[Endorsed]: No. 11119. United States Circuit Court of Appeals for the Ninth Circuit. Houghton Gifford, Appellant, vs. The Travelers Protective Association of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed August 7, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11119

HOUGHTON GIFFORD,

Appellant,

v.

THE TRAVELERS PROTECTIVE ASSOCIA-  
TION OF AMERICA,

Appellee.

CONCISE STATEMENT OF POINTS TO BE  
RELIED UPON BY APPELLANT ON  
APPEAL UNDER RULE 19, PAR. 6

Comes now Houghton Gifford, appellant herein, and as statement of points to be relied upon by him on his appeal herein, he does hereby adopt the statement of points filed by him on May 24, 1945, with the Clerk of the United States District Court for the Northern District of California, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure.

Dated: at San Francisco, California, this 7th day of August, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for Appellant



Receipt of copy of above Statement is hereby admitted this 7th day of August, 1945.

GAVIN McNAB, SCHMULOWITZ,  
AIKINS, WYMAN & SOMMER,  
NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Appellee

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION OF THE APPEAL UNDER RULE 19, PAR. 6

Comes now Houghton Gifford, appellant herein, and hereby designates, as the parts of the record which he thinks necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above entitled court by the Clerk of the United States District Court for the Northern District of California.

Dated at San Francisco, California, this August 7, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for appellant.

Receipt of copy of above Designation is hereby admitted this 7th day of August, 1945.

GAVIN McNAB, SCHMULOWITZ,  
AIKINS, WYMAN & SOMMER  
NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Appellee

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF  
THE RECORD DEEMED NECESSARY  
FOR THE CONSIDERATION OF THE  
APPEAL UNDER RULE 19, PARA-  
GRAPH 6.

Comes now The Travelers Protective Association of America, respondent herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure and Rule 19, paragraph 6 thereof of the rules of the United States Circuit Court of Appeals for the Ninth Circuit, designates the following as additional parts of the record which it thinks necessary and material for the consideration of the appeal in the above entitled action:

1. Memorandum decision on motions to dismiss and for summary judgment dated and filed herein on January 29, 1945.

2. Notice of plaintiff and Messrs. Dunne & Dunne and J. D. Lederman, his attorneys, from

Gavin Mc Nab, Schmulowitz, Aikins, Wyman & Sommer that the Honorable Judge Louis E. Goodman on January 29, 1945, granted defendant's motion to dismiss with leave to plaintiff to amend, reserving the Court's decision on defendant's motion for summary judgment until after filing of amended complaint by plaintiff dated February 1, 1945, and filed herein on February 2, 1945.

3. Exhibits "A" and "C" attached to the affidavit of T. G. Hagaman, verified October 10, 1944.

4. That Exhibit "B" attached to the affidavit of T. G. Hagaman, verified October 10, 1944, be copied for annexation in the Record on Appeal, unless in lieu thereof counsel for appellant offer to stipulate that they will secure an order from the District Court of the United States in and for the Northern District of California Southern Division to transfer said original Exhibit "B", attached to said affidavit, to the United States Circuit Court of Appeals for the Ninth Circuit and that after transfer of said record to the United States Circuit Court of Appeals for the Ninth Circuit said appellant will stipulate late that said United States Circuit Court of Appeals for the Ninth Circuit may consider said Exhibit "B" in its original form and further stipulate that counsel for respondent will furnish six (6) printed copies of said Exhibit "B" for said Court's use and consideration.

5. A copy of this designation dated at San Francisco, California, this 7th day of August, 1945.

Respectfully submitted,

GAVIN McNAB, SCHMULOWITZ, AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ  
PETER S. SOMMER

Attorneys for Appellee

Receipt of a copy of the within Appellee's Designation of Additional Parts of the Record on Appeal is hereby acknowledged this 7th day of August, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It Is Hereby Stipulated, Consented and Agreed, by and between the appellant and the appellee, that Exhibit "B" attached to the Affidavit of T. C. Hagaman, verified October 10, 1944, may be transmitted in its original form to the above entitled court by the Clerk of the United States District Court for the Northern District of California and that the above entitled court may consider said Ex-



hibit "B" in its original form on the appeal herein and that counsel for appellee are herewith furnishing six (6) printed copies of said Exhibit "B" for the use of the above entitled court and its consideration.

Dated at San Francisco, California, this 7th day of August, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for appellant

GAVIN McNAB, SCHMULOWITZ,  
AIKINS WYMAN &  
SOMMER

NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for appellee.

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit  
Judge

[Endorsed]: Filed Aug. 8, 1945. Paul P.  
O'Brien, Clerk.



No. 11,119

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HOUGHTON GIFFORD,

*Appellant,*

VS.

THE TRAVELERS PROTECTIVE ASSOCIATION  
OF AMERICA,

*Appellee.*

---

OPENING BRIEF OF APPELLANT

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DUNNE & DUNNE,

J. D. LEDERMAN,

333 Montgomery Street,  
San Francisco, California,

*Attorneys for Appellant  
Houghton Gifford*





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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HOUGHTON GIFFORD,

*Appellant,*

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION  
OF AMERICA,

*Appellee.*

---

OPENING BRIEF OF APPELLANT

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**JURISDICTION**

As appears from the complaint (R. 2-6) the amount in controversy, without interest or costs, is \$5,000.00. The action was removed from the Superior Court of the State of California in and for the City and County of San Francisco upon the ground of diversity of citizenship, and the requisite jurisdictional amount (R. 7). The jurisdiction of the District Court is sustained by Judicial Code, §24(1)(b) and Judicial Code, §28 (28 U.S.C.A. §§41(1)(b) and 71).

Final judgment in the District Court was rendered and filed February 14, 1945 (R. 28-30), and Notice of Appeal was filed May 14, 1945 (R. 30). The jurisdiction of this Court is sustained by Judicial Code, §128(a) First (28 U.S.C.A. §225(a) First).

The pleadings are not set out here in detail because they are set out under the Statement of the Case.

### STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States in and for the Northern Division of California, Southern Division, rendered on February 14, 1945.

Said judgment appears on pages 28 to 30 of the Transcript.

A reading of said judgment will disclose that it was made and entered upon a motion of the defendant and appellant for a summary judgment in its favor and upon a motion to dismiss the plaintiff's complaint with prejudice. Said motions appear at pages 10 to 17 of the Transcript.

*It should be noted that these motions were made and heard prior to any answer or demurrer of the defendant and, of course, prior to the trial of any of the issues embraced in the Complaint.* In other words, the judgment if allowed to stand, precludes the plaintiff from ever receiving any relief upon the facts set forth in his Complaint.

The Court filed a memorandum decision with respect to said motions. This appears on pages 26 and 27 of the Transcript. In that decision, the Court used the following language:

“Accordingly the motion to dismiss is granted with leave to plaintiff to appropriately amend his complaint (Rule 15 F.R.C.P.) (29).

“Decision on the motion for summary judgment is reserved and the court will determine the same after the amended complaint and such affidavits as defendant may desire to file are before the court.”

It thus appears the Court granted the motion to dismiss but gave plaintiff leave to appropriately amend his complaint; the Court reserved its decision on the motion for summary judgment until the amended complaint and such affidavits as defendant might file were before the Court. The plaintiff declined to amend his complaint and thereupon the Court rendered its judgment (Tr. 28 to 30), and therein stated as follows:

“It further appearing that the defendant is entitled to have its motion for a summary judgment granted upon the ground that it is entitled to a judgment dismissing plaintiff’s complaint, as a matter of law, for the reason that plaintiff’s cause of action is barred because of the lapse of time as stipulated in the contract of insurance referred to in plaintiff’s complaint;

“It is accordingly adjudged that the complaint in this action be and it is hereby dismissed with prejudice upon the ground that there is no genuine issue as to any material fact, and upon the further ground that the alleged cause of action set forth in plaintiff’s complaint has become barred, and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant in respect of his alleged claim arising under the certificate of membership, and the constitution

and by-laws of the defendant within six months after the refusal of the defendant to pay plaintiff's claim."

The points at issue on this appeal are few and clear.

### THE COMPLAINT

The Complaint in this action (Tr. 226) is one brought by the plaintiff and appellant as the *beneficiary named in the certificate of membership* issued by the defendant and respondent to one George Gifford (who was his father). The allegations of the Complaint set forth:

1. That the defendant was a *fraternal benefit society*.
2. That one George Gifford was a Class "A" member of the defendant for a period of fifteen (15) years, and *that he had fully complied during that period of time with all of the terms and conditions of such membership and had fully paid all the dues and assessments imposed upon him.*
3. That on the 9th day of May, 1932, there was issued and delivered by the defendant to George Gifford a certificate of membership, wherein and whereby said George Gifford was entitled to the benefits accruing to a Class "A" member of defendant, and whereby said defendant agreed to and did insure said George Gifford against any accident occurring to him from which a claim for benefits arose and that under said certificate of membership and insurance, defendant agreed to insure and pay the benefits accruing to said George Gifford in the case of his death, to the plaintiff, the son of said George Gifford.
4. That under and by virtue of said certificate, defendant agreed to pay to the plaintiff as the beneficiary named in said certificate, the sum of \$5,000.00 if said member



George Gifford were killed by accidental means, which, independently of all other causes through external, violent and accidental means, caused bodily injury which solely and exclusively caused the death of said George Gifford.

5. That said George Gifford was at all times mentioned in the Complaint and up to the time of his death—September 3, 1943—a Class “A” member in good standing and had fully complied with all the rules, regulations, by-laws, constitution and other requirements of defendant.

6. That on the 3rd day of September, 1943, said George Gifford was killed by accidental means, which, independently of all other causes, through external, violent and accidental means, caused bodily injuries to him, which bodily injuries were the sole and exclusive cause of his death on September 3, 1943.

7. The accidental manner in which said accidental death occurred is set forth fully and in detail in paragraph VII of the Complaint (Tr. 4 and 5).

8. That plaintiff has fully complied with all the terms and conditions of said certificate of membership and duly, and in the time provided for in said certificate, notified the defendant of the death of said George Gifford, and demanded payment of the \$5,000.00 insurance provided for in said certificate.

9. That the defendant refused to pay the said amount, or any portion thereof, and all thereof remains due, owing and unpaid.

Upon such motions of defendant, all intendments and inferences in favor of plaintiff that could possibly be drawn from the allegations of the Complaint must be made by

this Court and the facts and allegations and legal conclusions therefrom set forth in the Complaint must be deemed true and correct.

*Without filing an answer or demurring*, the defendant moved the lower court for a summary judgment in favor of the defendant dismissing plaintiff's complaint with prejudice (Tr. 11). The *only* ground of said motion was that the cause of action had become barred and that the claim had lapsed by reason of plaintiff's failure to bring action within six (6) months after the *purported* refusal of the defendant to pay.

The motion was supported by an affidavit of one T. J. Hagaman, the Assistant Secretary of defendant, wherein it is admitted that defendant had duly issued its Class "A" membership on May 9, 1932, set forth as Exhibit "A" (Tr. 21 to 24). Said affiant further incorporated in his affidavit as Exhibit "B" a copy of the articles of incorporation, constitution and by-laws of the defendant, in force and effect on September 3, 1943. Six printed copies of said Exhibit "B" (yellow) were by stipulation of counsel filed with the Clerk of this Court, and the printed Exhibit "B" was transferred in its original form to the Clerk of this Court (Tr. 44 and 45).

The affidavit further sets forth that prior to December 21, 1943, the plaintiff made a *claim against the defendant* (i.e., affiant's conclusion as to it being a claim) as the beneficiary under said certificate of membership, Exhibit "A", and that thereafter the defendant refused to pay the *claim* (sic), and notified the plaintiff in writing of its *refusal* (sic) and set forth its letter, *which purported to be such refusal, as Exhibit "C"* (Tr. 25).

The portion of the constitution and by-laws on which defendant based its motion, is set forth in said affidavit as Section 7 of Article 12, and is found on page 44 of the yellow printed articles of defendant filed with this Court, and on page 20 of the Transcript.

*It should be noted that the Complaint in this action was filed in the Superior Court of the State of California in and for the City and County of San Francisco on September 1, 1944 (Tr. 6).*

*Assuming that the so-called letter of refusal to pay, Exhibit "C" (Tr. 25), which was dated December 21, 1943, and sent from St. Louis, Missouri, to the plaintiff in San Francisco, was received on December 27, 1943 (as is alleged by the affiant in his affidavit on page 20), and inasmuch as the complaint was filed on the 1st day of September, 1944 in the Superior Court of the State of California, there was a lapse of time of exactly eight months and three days, and it is upon this single point of delay of two months and three days exceeding the six months period referred to in Section 7 of the Articles, that the defendant based its motions for summary judgment and for dismissal of the complaint with prejudice.*

#### **SPECIFICATION OF ERRORS**

The Court erred in holding that the complaint failed to state a claim upon which relief could be granted.

The Court erred in dismissing the complaint and/or rendering summary judgment upon the basis of matter not appearing on the face of the complaint.

The Court erred in holding that plaintiff's claim was barred by the lapse of time.

The Court erred in holding that the complaint failed to state a claim upon which relief could be granted in that it failed to anticipate a possible personal defense.

The Court erred in entertaining a motion for summary judgment.

The Court erred in holding that there was no genuine issue as to any material fact.

Reference is respectfully made to appellant's Statement of Points on which appellant intends to rely (R. 31, 32).



## ARGUMENT

## I.

THE PLAINTIFF BEING A BENEFICIARY AND NOT A MEMBER OF DEFENDANT FRATERNAL SOCIETY, WAS NOT BOUND BY SECTION 7 OF THE ARTICLES OF INCORPORATION, CONSTITUTION AND BY-LAWS, TO BRING THIS ACTION WITHIN SIX MONTHS FROM THE REFUSAL OF DEFENDANT TO PAY IF SUCH A REFUSAL WAS ACTUALLY MADE. (See Point II herein.)

At the outset it should be noted that the defendant is a fraternal benefit society (see paragraph I of Complaint, Tr. p. 2) and *that for over a period of fifteen (15) years George Gifford was a member of the defendant association and fully paid his dues and complied with all the terms of his membership* (par. II, Complaint, Tr. p. 2).

In considering claims against such fraternal organization, it has been held that the by-laws of such mutual benefit society must be construed liberally with a view to effectuate the benevolent purposes of their organization; that such by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the members are void.

See

*Niblack on Benefit Societies and Accident Insurance*,  
p. 32, Section 17.

Forfeitures are not favored by either courts of law or equity, and statutes and contracts are construed strictly against forfeitures and as liberally as possible to prevent them.

See

12 *Cal. Jur.*, Section 3, p. 634.

These principles are adopted and established by the courts. See

*Ells v. Order U. S. Travelers of Am.*, 20 Cal.(2d) 290, Syllabus 5, p. 291.

In that case, on page 293, the Court said:

"The basis of these decisions is that since the insured is a party to the contract of insurance, he is charged with knowledge of all its terms, including the constitution of the order, as the latter was made a part of the contract. *However, we wish to add at this time that these cases are of doubtful authority in determining whether the beneficiaries named in the insurance certificate but not the parties to the contract are charged with knowledge of its terms.*"

On page 294 the Court said:

"It might be well to call attention to the fact that appellant, as appears from its name, is a 'fraternal beneficial order' and that one of its objects, as appears from its constitution, is 'To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.' *The rules and regulations of such an order are not given the strict and rigid construction applied to the interpretation of ordinary contracts of insurance.* In the case of *Journeyman Butchers' Association v. Bristol*, 17 Cal. App. 576 (120 Pac. 787), the principle was announced at page 578 in the following language: '*As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order.* (Citing cases.)'"

That these fraternal society memberships and certificates are to be construed liberally to effect their benevolent purposes, see

*Journeyman Butchers' Prot. and Benevolent Assn. of the Pacific Coast*, 17 Cal. App. 576, second syllabus.

In this case the Court said on page 578:

“As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order.”

That periods of limitations provided for in the articles, constitution and by-laws of fraternal societies and their insurance policies have not the force of statutory law when they are in derogation of and cut down the statutory limitation within which an action may be brought, see

*Bollinger v. National Fire Ins. Co.*, 25 Cal.(2d) 399.

In that case the Supreme Court of the State of California held *that the short period of limitation of fifteen (15) months fixed in the contract of insurance within which suit might be brought, must be disregarded by the courts when necessary to serve the ends of justice, and that such a provision is not binding on the insured.*

On page 410, the Court said:

“In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed, it has shown itself ready to adapt rules of procedure to serve the ends of justice *where technical forfeitures would unjustifiably prevent a trial on the merits.* (Citing cases.)”

And the Court made very pertinent remarks about the good faith of insurance companies and its duty to its insured, when it used the following language on page 411:

"It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of contracting and persists *throughout the period when premiums are paid and no return is sought*, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm's length. It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or *whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.*"

An illuminating case in which the *defendant here was the defendant there, and which refused to enforce the limitation of six months provided by this very Section 7 of the by-laws*, is the case of

*Kendall v. Travelers' Prot. Ass'n of America*, 169 Pac. Rep. 751.

In that case, *this very same defendant sought to evade its responsibility by claiming that the action had not been brought within six months after the refusal of the Company to pay, and set forth the identical Section 7 described in the affidavit in this case.*

The Court on page 756 discusses the conventional limitations in policies of insurance of this kind in a fraternal organization, and holds that any ambiguity or conflict in the articles or by-laws must be construed in favor of the



insured and against the company, and though *the action was brought after the six months limitation provided in Section 7 of the articles of the constitution and the by-laws*, the Court held that the action was brought in time.

On page 757 the Court said:

\* \* \* "that construction will not be placed upon the contract which will enable one party in its discretion to destroy or abridge a plain right of the other under the same contract. We are of the opinion, therefore, that under the admitted facts the action was commenced in time."

Similarly the courts of California have refused to enforce a by-law of a fraternal organization which required action to be brought *within eighteen months* after the death of the insured.

See

*Bennett v. Modern Woodmen of America*, 52 Cal. App. 581.

The court in that case said that it would follow the rule announced in *Case v. Sun Ins. Co.*, 83 Cal. 473, 476, holding that the plaintiff's action is removed from the application of the general rule of limitations, and the Court on page 587 said as follows:

"To hold otherwise would enable the insurer to collect assessments indefinitely, in disregard of the forfeiture, so long as it suited its interest to do so," \* \* \*

and said:

"The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

A very recent case illustrating the refusal of courts to enforce short periods of limitations contained in policies of insurance, is the case of

*Bollinger v. National Fire Ins. Co.*

This case was decided December 6, 1944, in 25 Cal.(2d) page 399, and in that case on page 407, the Court said:

“Under the circumstances of the present case it would be manifestly unjust for this court to prevent a trial on the merits which the law favors (citing cases).”

On page 411 the Court says:

“Statutes of limitations are not so rigid as they are sometimes regarded.”

And the Court concluded its opinion on page 411 with the following trenchant language:

“It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.”

It has very recently been held by the Supreme Court of California that the rules and regulations of a fraternal benefit society are not given the strict and rigid construction applied to ordinary contracts of insurance.

See

*Ells v. Order of United Commercial Travelers of America*, 20 Cal.(2d) 290, syllabus 2, 3, 4 and 5.

The Court in that case on page 294 used the following language:

“It might be well to call attention to the fact that appellant, as appears from its name, is a ‘fraternal beneficial order’ and that one of its objects, as appears from its constitution, is ‘To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.’ (2) The rules and regulations of such an order are not given the strict and rigid construction applied to the interpretation of ordinary contracts of insurance. In the case of *Journeyman Butchers’ Association v. Bristol*, 17 Cal. App. 576 (120 Pac. 787), the principle was announced at page 578 in the following language: ‘As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order.’ (3 Am. & Eng. Ency. of Law, 1067; Niblack, §§160-175; *Keener v. Grand Lodge*, 38 Mo. App. (543) 553.)”

“Niblack on Benefit Societies and Accident Insurance states in section 17, page 32: ‘The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization.’ The same author further states in section 23, page 44: ‘\* \* \* their by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void.’”

And the Court further—on page 301—said as follows:

“These facts were that the beneficiary (plaintiff) had no knowledge of the existence of the insurance, and therefore knew nothing of the forfeiture clause

in the policy. It was further held by said court that the beneficiary was excused from giving notice. The only possible reason the court should so hold, it seems to us, would be predicated upon the fact that the beneficiary had no knowledge of the insurance until after the body was cremated. \* \* \*

"It is well settled in this state as well as in other jurisdictions that forfeitures are not favored by either courts of law or equity. 12 Cal. Jur., section 3, page 634, states: 'statutes and contracts are construed strictly against forfeitures or as liberally as possible to prevent them.' This rule against forfeitures is so well established that further citation of authority is, we think, unnecessary."

We therefore submit that the plaintiff (*a mere beneficiary*), not being a member of the defendant fraternity society, is not bound by the very short period of limitation provided for in its articles and by-laws. *A fortiori* is this so, when *a member himself* is not bound by such short period of limitation as was decided in the foregoing cases.

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## II.

THE LETTER OF DEFENDANT, DATED DECEMBER 21, 1943, TO THE PLAINTIFF, EXHIBIT "C" (Tr. 25) WAS NOT A REFUSAL OF THE DEFENDANT TO PAY THE CLAIM WITHIN THE PURVIEW OF SECTION 7 OF DEFENDANT'S BY-LAWS (Tr. p. 20).

The letter is set forth in full on page 25 of the Transcript and was attached as Exhibit "C" to defendant's moving papers. A close examination of that letter does not convey to the recipient a flat refusal in any event to



make payment of any claim. The letter is an evasive one calculated to do the very thing it succeeded in doing, to wit: to lull the recipient into a belief that further negotiations or correspondence should be undertaken.

Firstly, in the opening paragraph of the letter it purports to be a notification that the defendant had made an *investigation of the facts in accordance with the request made by the MOTHER of the beneficiary*. No reference is made to any claim for payment made by the plaintiff, the beneficiary and appellant herein.

The second paragraph is a recital of what the defendant believes to be the legal effect of the language used in its certificate of insurance. It then goes on to state as follows:

“The conclusion reached by the pathologist who performed the autopsy is that your father’s death was caused by ‘Coronary sclerosis with occlusion and myocardial failure’.”

The final paragraph of the letter following the foregoing quotation is as follows:

“Under the circumstances we regret to advise you that there is no liability on the part of the Association and it regrets that it cannot be of service to you.”

There was no occasion for the making of this statement. No services were requested by the plaintiff and no opinion was requested by him of the defendant as to what the legal effect of the language of the certificate of insurance might be. All that the *mother* of plaintiff had done was to notify the defendant of the accident and the death of his father. No formal presentation of any claim

under the certificate of insurance up to that time had been made and *no demand for payment of the claim had been made by the beneficiary, the appellant herein*. So the defendant could obviously not treat its letter as a refusal to pay a claim which had not yet been made or presented by the beneficiary, the plaintiff herein.

All that was required of the beneficiary was to notify the defendant of the accident and the death of its member George Gifford (as was done by his *mother*) and it was then incumbent upon the defendant to investigate the facts. The plaintiff in his complaint alleges in paragraph VII, page 5:

“Plaintiff has fully complied with all of the terms and conditions of said certificate of membership described in Paragraph III hereof, and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford as above described, and demanded payment of the \$5,000.00 insurance provided for in said certificate of membership heretofore described.”

The defendant cannot by its ingenuous letter of December 21, 1943, torture its language into a flat refusal of payment of a claim that had not yet been made. *All that it succeeded in doing by that letter was to lull the plaintiff into a situation whereby the plaintiff waited for a period of eight months and three days before filing his action to enforce the payment of this claim.*

It may well be that plaintiff made further investigation of the cause of the member's death and sought advice concerning the liability of defendant and such a short delay of 2 months and 3 days can not have misled or caused defendant any detriment or danger; and defendant has made no showing to that effect.

The action of the defendant in lulling the plaintiff into his present situation, estops defendant from now asserting that said letter constituted a final refusal of payment (which it did not) and prevented it from now seeking to take an unconscionable advantage of the *plaintiff, a mere beneficiary, not familiar with the rules, by-laws and constitution of the defendant fraternal association.*

The courts have declared that they will not lend themselves to countenance such inequitable procedure. See

*Bollinger v. National Fire Ins. Co.*, 25 Cal.(2d) 399 (supra);

*Kendall v. Travelers' Prot. Ass'n of America*, 169 Pac. Rep. 751 at p. 757 (supra).

The action and conduct of the defendant and the writing of the letter, Exhibit "C" (Tr. 25), and the effect thereof on the plaintiff, creates an equitable estoppel against the defendant now asserting the plea in bar, based upon the limitation period provided for in Section 7 of its constitution; and this is true even though there was no designed fraud on the part of the defendant company. See

*Benner v. Industrial Acc. Comm.*, 26 A.C. No. 12, page 265.

In that case the petitioner wrote a letter to the employer on May 11, 1943, notifying it that the petitioner had a claim against it for tuberculosis industrially caused and compensable. The action was not brought until more than six months after May 11, 1943. The Commission found that day as the one on which she had knowledge of the injury and held that her claim was barred, because it was not filed within six months thereafter, to wit: on November 16, 1943.



There as in this case, the defendant company had written a letter advising the petitioner that it was investigating the facts; but notwithstanding the finding and conclusion of the Commission that the petitioner was barred by the six months limitation, the Appellate Court held that the action could be maintained because of the equitable estoppel arising against the defendant. The second and third syllabuses of that case are as follows (p. 265):

“(2) Estoppel—Elements—Fraud.—An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped.

“(3) Id.—Elements.—To create an equitable estoppel, it is enough that the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.”

On the doctrine of equitable estoppel and its effect in estopping the defendant from pleading the six months' provision as a bar, see also:

*Farrell v. County of Placer*, 23 Cal.(2d) 624;

*Verdugo Canon Water Co. v. Verdugo*, 152 Cal. 655 at page 682.

In the latter case, the Court said:

“It is enough if the party has been induced to refrain from using such means or taking such action as lay in his power by which he might have retrieved his position and saved himself from loss.”

In

*Adams v. Cal. Mut. B. & L. Ass'n*, 18 Cal.(2d) 487,

the Court at page 488 said:



“It is well settled that a person by his conduct may be estopped to rely upon these defenses;”

and in

*Rapp v. Rapp*, 218 Cal. 505,

the Court held that where the delay in commencing action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. To the same effect, see

*Miles v. Bank of America, N. T. & S. Ass'n*, 17 Cal. App.(2d) 389, at page 397;

37 *Corpus Juris*, pp. 725-726.

In the concluding paragraph of its decision in the case of *Benner v. Industrial Acc.*, supra, the Court, on page 269, held as follows:

“Such conduct, so relied upon, becomes the basis of an estoppel against the party responsible for the delay and should, under the facts here presented, preclude the bar of the statute of limitations.”

And in that case, it should be noted that the Commission below had directly found that the action was barred; nevertheless, the Supreme Court reversed the decision with instructions to proceed in accordance with its views.

So also has it been held that the doctrine of equitable estoppel applies even against the Government and its agencies. See

*Farrell v. County of Placer*, 23 Cal.(2d) 624.

In that case, which was an action against a county for personal injuries, the Court held that the defendants were estopped to complain that plaintiff's complaint was filed after the expiration of the ninety (90) day period pre-

scribed by Statute of 1931, because before the expiration of that time, the plaintiff had filed a complete statement concerning the accident and she was advised to wait until she knew the extent of her injuries. See

Third syllabus on page 624.

And the Court quoted with approval from the case of *Times-Mirror Company v. Superior Court*, on page 628,

as follows:

“Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. ‘It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.’ (Humboldt Sav. Bank v. McCleverty, 161 Cal. 285 (119 P. 82), citing Story’s Equity Jurisprudence, secs. 28, 439; 1 Pomeroy’s Equity Jurisprudence, sec. 60.) \* \* \* \* ‘Although equity is and long has been in every sense of the word a system, and although it is impossible that any new principles should be added to it, yet the truth stands and always must stand that the final object of equity is to do right and justice.’ ”

That such conduct estops the defendant is especially true when we consider that the defendant here is seeking to abridge and shorten the ordinary statute of limitation by asserting a plea in bar based upon a much shorter period of time, to wit: six months; and it must be remembered *that the plaintiff was not and is not a member of*

*defendant's association, but a mere beneficiary, and as the courts have held, is not deemed to have notice of the short period of limitations provided for in the defendant's articles and by-laws. Thus, in the case of*

*Bennett v. Modern Woodmen of America*, 52 Cal. App. 581, at page 587,

the Court refused to enforce a by-law of the organization which required action to be brought within eighteen (18) months after the death of the insured, and further said it would follow the rule announced in

*Case v. Sun Ins. Co.*, 83 Cal. 473, 476,

holding that the plaintiff's action is removed from the application of the general rule of limitations, and on page 587 the Court used the following language, which is peculiarly appropriate to the case at bar:

"The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

In the case of

*Bollinger v. National Fire Ins. Co.*, 25 Cal.(2d) 399,

the Court at page 407 said:

"Under the circumstances of the present case *it would be manifestly unjust for this court to prevent a trial on the merits which the law favors* (citing cases)."

and on page 411 the Court said:

"Statutes of limitations are not so rigid as they are sometimes regarded."

*A fortiori*, the by-laws of a fraternal association of which the plaintiff is not a member cannot be held so rigid as to constitute a bar to plaintiff's claim, and prevent him from having his day in court.

### III.

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE, AND THEREFORE A JUDGMENT BASED ON SUCH MOTION WAS IN ERROR.**

It should be noted that the plaintiff's complaint was the only pleading on file. Defendant had not demurred or answered. In such a situation, the motion of defendant for summary judgment was premature and unwarranted.

See

*Rules of Civil Procedure 12*, Subdivision (c);  
*Snowwhite v. Tidewater Associated Oil Company*,  
 40 Fed. Supp. 739, 741.

The motion to dismiss the complaint with prejudice filed by the defendant in connection with his motion for summary judgment is in the nature of the old demurrer and on such a motion every allegation of the complaint must be treated as admitted, and *the duty of the court is not to test the final merit of the claim, but rather to consider in the light most favorable to the plaintiff and with every intendment regarded in his favor, whether the complaint is sufficient to constitute a valid claim.*

See

*Tahir Erk v. Glenn L. Martin Co.*, 116 Fed.(2d)  
 865, Syllabus 1 and 2, and page 867;  
*Leimer v. State Mut. Life Assur. Co.*, 108 Fed.(2d)  
 302, at page 305.



At page 306 of the latter case, the Court said:

“we think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.” (Citing cases.)

The same Court that granted the summary judgment in this case had very shortly theretofore decided that Rule 12 of the Civil Procedure authorized the Court in the case of motion to dismiss to defer the hearing and determination thereof until the time of trial; see

*Bowles v. Bissinger & Co.*, decided May 2, 1940 by  
Judge Goodman,

and the Court then used this language:

“In the interests of justice, decision with respect to the sufficiency and materiality of the second special defense pleaded by the defendant should not be made in this case solely upon the basis of the language of the pleading.”

And the Court thereupon denied the motion to strike said second special defense.

In the case of

*Perry v. Creech Coal Co.*, 55 F. Supp. 998,

the Court stated the rule as follows:

“Pleadings should be liberally construed in favor of the pleader and a motion to dismiss for failure to state a claim should not be granted unless it clearly appears that plaintiff would be entitled to no relief

under any state of facts which could be proved in support of the claim.”

The complaint alleges that the plaintiff has fully complied with all the terms and conditions of the certificate of membership, and duly and in the time provided for in said certificate notified the defendant of the death of the insured, and demanded payment of the insurance provided for in said certificate (see paragraph VIII of the Complaint (Tr. 5)).

The by-laws concerning limitations, asserted by the motion to dismiss and the motion for summary judgment do not *ipso facto* operate as a bar, but rather as a defense to be pleaded by the party relying upon it, and unless such plea is made it would not be a bar to the action; see

*Kissick Const. Co. v. First Nat. Bank of Wahoo*, 46  
Fed. Supp. 869,

where the Court used the following language on page 871:

“Although the petition may have shown on its face that the causes of action stated in the first and third counts were barred by the statute of limitations, yet, unless the defendant had seen fit to interpose the bar by appropriate plea, the plaintiff would have proceeded to judgment thereon. *The plea of the statute is personal to the defendant. It might, as debtors often do, have waived the privilege.* \* \* \*

“Here, the available bar of the statute of limitations, *not appearing on the face of the petition*, is by the defendant made to appear by a credible, persuasive and undisputed showing by the defendant in support of its motion.”

The Court thereupon overruled a motion for summary judgment. On page 872 the Court said:

“An examination of Rule 56 and its several sections, and of the decisions delivered in the course of its application leads to the *conclusion that a summary judgment should not be granted unless the facts are clear and undisputed*; and that if a controversy remains upon any question of fact, judgment should abide a trial of the action upon its merits.” (Citing cases.)

*In the case at bar there is nothing in the complaint which shows the action to be barred by any provision of the certificate, by-laws or statute.*

The discretion of the Court on a *motion to dismiss* should be exercised only if the defect clearly appears on the face of the pleading, otherwise the defense should be raised on motion for judgment on the pleadings after joinder of issue; see

*Teren v. San-Nap-Pak Mfg. Co., Inc.*, 49 Fed. Supp. 1023, U.S. Dist. Ct., S.D.N.Y., Feb. 11, 1943;  
*Continental Collieries, Inc. v. Shober*, 130 F.(2d) 631.

To the same effect see:

*Brauch v. Birmingham*, 49 Fed. Supp. 229;  
*Tyler Fixture Corp. v. Dun & Bradstreet*, 3 F.R.D. 258;  
*Kohler v. Jacobs*, 138 F.(2d) 440;  
*Dioguardi v. Durning*, 139 F.(2d) 774.

The federal rules do not sanction the disposition of doubtful issues of fact or law on motions to dismiss for insufficiency of the pleading:

*Publicity Building Realty Corp. v. Hannegan*, 139 F.(2d) 583;

*United States v. Thurston County*, 54 F. Supp. 201;

*Bowles v. Shirey*, 7 Fed. Rules Serv. 152.

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We respectfully submit that under the decisions and rules of procedure the motion for summary judgment and for a dismissal of the complaint with prejudice was premature, unfounded, and wrongful as to the appellant, a beneficiary named in the certificate of insurance who was not a member of defendant's association.

Under the authorities above cited, the judgment based upon such motions should be reversed.

Respectfully submitted,

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No. 11,119

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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HOUGHTON GIFFORD,

*Appellant,*

VS.

THE TRAVELERS PROTECTIVE ASSOCIATION OF  
AMERICA,

*Appellee.*

**BRIEF FOR APPELLEE.**

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**FILED**

**NOV 1 - 1945**

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**BRIEF FOR APPELLEE.**

---

**A. FACTS CONCERNING JURISDICTION OF THE  
FEDERAL COURT.**

The complaint in this case was originally filed in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr. p. 2.)

The defendant and appellee is a fraternal benefit society incorporated under the laws of the State of Missouri. It filed its petition for the removal of the case to the District Court of the United States for the Northern District of California. (Tr. p. 7.)

The petition for removal asserted that the plaintiff sought to recover from the defendant the sum of \$5000.00, and the controversy was wholly between citizens of different states. Thereafter the Superior Court made its order

of removal (Tr. p. 7) and the certified copy of the record was in due course filed with the Clerk of the District Court. (Tr. p. 8.)

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## **B. CONCISE STATEMENT OF THE CASE BY APPELLEE.**

For purposes of brevity, the defendant appellee will be referred to hereafter as the Association.

1. The question involved on this appeal is whether a contract of insurance which shortens the statutory period of limitation is reasonable and valid when it provides that an action must be commenced "within six months after the refusal" of the defendant-appellee Association to pay the claim asserted, and when it further appears that the complaint in this case was, in fact, filed more than six months after the Association refused to pay plaintiff's claim.

2. The manner in which the aforesaid question was raised was as follows:

(a) The Association filed a motion for a summary judgment of dismissal under the authority of Rule 56b of the Rules of Civil Procedure. (Tr. p. 10.)

(b) In addition, the Association filed a motion to dismiss the complaint under the authority of Rule 12, subdivisions (a), (b) and (c) of the Rules of Civil Procedure. (Tr. p. 12, et seq.)

3. The District Court Judge granted the defendant's motion to dismiss plaintiff's complaint but at the same time granted plaintiff leave "to appropriately amend his complaint". (Tr. p. 26.)



The decision on the defendant's motion for a summary judgment was reserved until plaintiff had filed, if he was so disposed, an amended complaint. (Tr. p. 26.) However, the plaintiff did not avail himself of the right to file an amended complaint, and thereafter the District Court decreed that the defendant was entitled to a judgment dismissing plaintiff's complaint, and accordingly declared that the complaint was dismissed "upon the ground that there is no genuine issue as to any material fact and \* \* \* that the alleged cause of action set forth in plaintiff's complaint has become barred and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant \* \* \* within six months after the refusal of the defendant to pay plaintiff's claim." (Tr. p. 28.)

The plaintiff is appealing from the aforesaid order of the District Court.

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### **C. APPELLEE'S STATEMENT OF FACTS.**

#### **1. Facts alleged in the complaint.**

The Association is a fraternal benefit society incorporated under the laws of the State of Missouri and transacting business in the State of California. (Tr. p. 2.)

On May 9, 1932, it issued a Class "A" certificate of membership to George Gifford under which it insured his life, if his death was caused by accidental means. (Tr. p. 3.) The proceeds of the certificate were payable to the plaintiff. The insured was a member of the Association in good standing when, on September 3, 1943, it is alleged he was "killed by accidental means". (Tr. p. 4.)

Plaintiff alleges he gave notice of death to the Association; demanded payment of \$5000.00, and that the Association "refused" to make the payment. (Tr. p. 5.)

**2. Facts alleged in affidavit supporting Association's motions.**

Plaintiff's complaint referred to (Tr. p. 3) but did not disclose the terms of the certificate of membership issued to George Gifford. The affidavit, filed in support of defendant's motions, presented in the District Court (Tr. p. 18) included a verbatim copy of the certificate of membership (Tr. p. 21) in which it is provided in part:

"This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Association, and Application for Membership, signed by said member, and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits."

The affidavit further disclosed the provision in Article XII, Section 7, of the Constitution and By-Laws of the Association, which may be examined both in the affidavit (Tr. p. 20) and, also, in the Constitution and By-Laws (p. 44, lines 25 to 33) which are before the court in their original form pursuant to stipulation. (Tr. p. 44.)

The provision in question carries the heading "Limitations for Suits" and reads thus:

*"Sec. 7. No action against this Association for the recovery on any claim arising under the Certificate of Membership or the Constitution and By-Laws shall be sustained unless commenced within six months after the refusal of this Association to pay the same and a lapse of such period shall be conclusive evidence*

*against the validity of such claim asserted if an action for its enforcement be subsequently commenced.” (Tr. p. 20.)*

There is no averment in the complaint as to the date when plaintiff notified the Association of the death of the insured, nor as to the date when the Association refused payment of plaintiff's demand.

However, the Association's affidavit discloses that prior to December 21, 1943 (Tr. p. 19) plaintiff, as the beneficiary named in the certificate, presented his claim against the Association, and on December 21, 1943, the Association denied liability in writing, and informed plaintiff of its refusal to pay plaintiff's demand, and that the plaintiff received the Association's written refusal to pay on December 27, 1943. (Tr. p. 20.) The written denial of liability and refusal to pay plaintiff's demand is set forth on page 25 of the transcript and may also be found set out at length later in this brief.

The record further shows that no action was commenced by plaintiff until September 1, 1944 (Tr. p. 6) which was more than six months after the date of the Association's refusal to pay plaintiff's claim.

**D. SUMMARY OF ARGUMENT.**

1. A summary judgment is properly granted when it appears, either from the complaint or by affidavit filed by defendant, that the cause of action is barred by contract.

2. A contract of insurance, like other contracts, should be construed according to the sense and meaning of the terms which the parties have used.

3. An insurer may limit by contract the time within which suit may be brought on the policy so as to provide a shorter period of time than is provided by law, provided the interval is not unreasonable.

4. An insurance contract limitation of six months, after refusal to pay, is not unreasonable.

5. The delay by plaintiff in commencing his suit for a period beyond six months was in no way attributable to the Association, and the plaintiff does not charge in his complaint, nor did he indicate when he had the opportunity so to do, by amending his complaint, that the Association either expressly or impliedly urged plaintiff to delay for more than six months the commencement of his suit, after refusing to pay his claim.

6. Appellant's arguments are not supported by his citations of authorities which are inapplicable, in any event, to the facts in this case.



## E. ARGUMENT.

1. A SUMMARY JUDGMENT IS PROPERLY GRANTED WHEN IT APPEARS EITHER FROM THE COMPLAINT OR AFFIDAVIT FILED BY THE ASSOCIATION THAT THE CAUSE OF ACTION IS BARRED BY CONTRACT.

The District Court was entitled to consider the Association's affidavit on its motion for a summary judgment. The rules clearly declare (56b) that, "a party against whom a claim \* \* \* is asserted \* \* \* may at any time move with or without supporting affidavits for a summary judgment in his favor \* \* \*"

It is also declared in the rules (56c) that, "the judgment sought shall be rendered forthwith if the pleadings \* \* \* admissions on file, together with affidavits \* \* \* show that \* \* \* there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law". (See judgment, Tr. p. 28, et seq.)

There are many instances in which motions for a summary judgment have been granted both with and without supporting affidavits.

*Whiteman v. Federal Life Insurance Co.* (W. D. Mo.). Department of Justice Bulletin 24 (this case involved an accident insurance policy);

*Post v. Goethals*, 104 Fed. (2d) 706;

*Rabe v. Metropolitan Life* (Mass., 1940), 1 F. R. D. 391;

*Miller v. Hoffman* (N. J., 1940), 1 F. R. D. 290, at page 291;

*American Insurance Co. v. Gentile Bros.* (Fifth Circuit, 1940), 109 Fed. (2d) 732;

*Bicknell v. Lloyd Smith* (Second Circuit, 1940), 109 Fed. (2d) 527;

*Standard Rolling Mills v. National, etc.* (N. Y., 1942), 2 F. R. D. 236;  
*Reynolds v. Needle* (D. C., 1942), 132 Fed. (2d) 161;  
*Altman v. Curtis Wright* (Second Circuit, 1940), 124 Fed. (2d) 177;  
*Sanders v. Nehi* (Texas, 1939), 30 Fed. Supp. 332;  
*Bushwick v. Ford Motor* (N. Y., 1940), 30 Fed. Supp. 917;  
*Viking Press v. Goldman* (N. Y., 1941), 38 Fed. Supp. 1014;  
*Divine v. Levy* (La., 1940), 36 Fed. Supp. 55;  
*Eberle v. Sinclair* (Okla., 1940), 35 Fed. Supp. 890;  
*Kissick v. First National* (Neb., 1942), 46 Fed. Supp. 869;  
*U. S. v. Maryland Casualty Co.* (La., 1944), 54 Fed. Supp. 290;  
*Kithcart v. Metropolitan Life Ins. Co.*, 150 Fed. (2d) 997.

In *Alabama etc. v. Shell* (Ala., 1939), 38 Fed. Supp. 386, the Court, in considering the question as to whether facts appearing in affidavits, etc., may be considered in the disposition of a motion to dismiss, said:

“We are of the opinion that the affidavits \* \* \* and answers to interrogatories may be considered here on all the motions, the latter being within the terms of Rule 12-b, defenses in law and in fact.”

A motion to dismiss a complaint which is supported by an affidavit is referred to as a “speaking” motion.

See:

*Samara v. U. S.* (Second Circuit, 1942), 129 Fed. (2d) 594 at page 597.

Motions to dismiss may be granted in all cases where it appears that the plaintiff has not stated and cannot state a claim upon which relief can be granted.

*Keasby v. Martison* (Pa., 1941), 1 F. R. D. 626;  
*Tahir Erk v. Glenn Martin*, 116 Fed. (2d) 865;  
*Singer v. Union Pacific* (Eighth Circuit, 1940), 109 Fed. (2d) 491.

See also:

*Monroe v. Ordway*, 103 Fed. (2d) 813;  
*Continental v. Ehrhart*, 1 F. R. D. 199;  
*Roe v. Sears Roebuck*, 132 Fed. (2d) 829, 832;  
*Sadler v. Guardian Life, etc.*, 40 Fed. Supp. 772;  
*Pen. Ken. etc. v. Warfield*, 137 Fed. (2d) 871;  
*Johnston v. United States*, 38 Fed. Supp. 544;  
*Hemler v. Union, etc.*, 40 Fed. Supp. 824;  
*Means v. McFadden*, 25 Fed. Supp. 993.

- 
2. A CONTRACT OF INSURANCE, LIKE OTHER CONTRACTS, SHOULD BE CONSTRUED ACCORDING TO THE SENSE AND MEANING OF THE TERMS WHICH THE PARTIES HAVE USED, AND IF THEY ARE CLEAR AND UNAMBIGUOUS THEIR TERMS ARE TO BE TAKEN AND UNDERSTOOD IN THEIR PLAIN, ORDINARY AND POPULAR SENSE.

*Imperial etc. Ins. Co. v. Coos County*, 38 L. ed. 231;  
*Birss v. Order of United, etc.*, 109 Neb. 226;  
*Kingsley v. American, etc. Ins. Co.*, 259 Mich. 53;  
*Standard, etc. Co. v. McNulty* (Eighth Circuit), 157 Fed. 224;  
*Delaware Ins. Co. v. Green*, 120 Fed. 916;  
*Ginsburg v. Butler*, 217 Cal. 467.

3. AN INSURER MAY LIMIT BY CONTRACT THE TIME WITHIN WHICH SUIT MAY BE BROUGHT ON THE POLICY SO AS TO PROVIDE A SHORTER PERIOD OF TIME THAN IS OTHERWISE PROVIDED FOR BY LAW SUBJECT, ONLY, TO THE CONDITION THAT THE INTERVAL IS NOT UNREASONABLE.

*Genuser v. Ocean Acc. etc. Corp.*, 57 Cal. App. (2d) 979;

*Penn. R.R. Co. v. Mid State, etc. Co.*, 21 Cal. (2d) 243;

*Tebbets v. Fidelity and Casualty Co.*, 155 Cal. 138;

*Bollinger v. National Fire Ins. Co.* (1944), 23 A. C. 888;

*Bennett v. Modern Woodmen*, 52 Cal. App. 581;

*Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal. (2d) 748;

*U. S. v. Curtis Aeroplane Co.*, 50 Fed. Supp. 477;

*U. S. v. Fleisher Engineering & Constr. Co.*, 45 Fed. Supp. 781;

*McCormick v. Woodmen of The World*, 57 Cal. App. 568;

*Schram v. Robertson* (Ninth Circuit), 111 Fed. (2d) 722, 724;

*Olds v. General Acc. Fire*, 67 A. C. A. 946;

*Beeson v. Schloss*, 183 Cal. 618.



4. AN INSURANCE CONTRACT, CARRYING A LIMITATION OF SIX MONTHS, FOLLOWING A REFUSAL TO PAY, IS NOT AN UNREASONABLE PERIOD OF LIMITATION.

In *Tebbetts v. Fidelity & Casualty Co.*, *supra*, the policy provided that affirmative proof of death of the insured must be furnished the company within two months after its occurrence and that, "legal proceedings for recovery hereunder may not be brought before the expiry of three months from the date of filing proofs to the company's home office, nor at all, unless begun six months from the time of death".

A general demurrer was interposed to the complaint and was sustained. The Supreme Court of California ruled that the demurrer was properly sustained and declared that, "a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid if the time limited be in itself not unreasonable". And the Court further declared that, "the six months period is not in itself unreasonable", notwithstanding the fact that it began to run from the date of death; whereas, in the contract under consideration in this case, the time within which suit might be filed ran six months "after the refusal of this Association to pay", thus adding on to the period within which suit might be filed the interval between date of death and date of refusal to pay.

In the case at bar, death occurred on September 3, 1943. (Tr. p. 4.) The plaintiff received notice of the Association's refusal to pay on December 27, 1943. The six months contract of limitation did not begin to run on

September 3, 1943, but on December 27, 1943, and expired on June 27, 1944.

As already indicated, the complaint in this action was not filed until September 1, 1944. (Tr. p. 6.)

Under these facts, it is respectfully submitted that the six months period, provided for in the contract of insurance involved in this case, is not in itself unreasonable, and after a six months provision was sustained in the *Tebbetts Case*, where it ran from date of death, for even greater reasons should it be sustained in this case where it runs from date of refusal of payment.

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5. THE DELAY BY PLAINTIFF IN COMMENCING HIS SUIT WAS IN NO WAY ATTRIBUTABLE TO THE ASSOCIATION, AND THE ASSOCIATION DID NOT, EITHER EXPRESSLY OR IMPLIEDLY, URGE THE PLAINTIFF TO DELAY FOR MORE THAN SIX MONTHS THE COMMENCEMENT OF HIS SUIT AFTER REFUSING TO PAY HIS CLAIM.

On December 21, 1943, the Association addressed a communication to the plaintiff acknowledging the receipt of the notice of the insured's death and proceeded to point out the basis upon which the Association refused to recognize liabilities. The letter reads as follows:

“December 21, 1943

Mr. Houghton Gifford  
1390 Hugo Street  
San Francisco (8), California.

In re: George Gifford, Deceased  
No. 36827

Dear Sir:

Upon receipt of the notice of your father's death this Association, in accordance with the request made by your mother, investigated the facts in reference thereto.

This Association provides benefits for the beneficiaries of its members in those cases where death is due to external, violent and accidental means independently of all other causes. Liability is expressly excluded where death is caused wholly through any bodily or mental infirmity or disease. The conclusion reached by the pathologist who performed the autopsy is that your father's death was caused by 'Coronary sclerosis with occlusion and myocardial failure. Angioma of the brain. Pyelonephritis.' The official death certificate likewise discloses that death was 'Death due to natural causes.' Under the circumstances we regret to advise you that there is no liability on the part of the Association and it regrets that it cannot be of service to you.

Sincerely yours

The Travelers Protective  
Association of America

(sgd.) By Theo C. Abele

Secretary

TCA:MPP:EPP''

There can be no question but that the foregoing letter was intended by the Association as a refusal to pay, for it unequivocally expressed its regret to advise the plaintiff that there was "no liability" on its part, and it further expressed its regret that it could not be of service to the plaintiff.

Furthermore, there can be no doubt but that the plaintiff interpreted the foregoing letter as the Association's refusal to make payment for, when he filed his complaint on September 1, 1944, he alleged in paragraph IV thereof (Tr. p. 5), that the defendant had refused payment.

At the time of the hearing of the defendant's motion for a summary judgment, and following the notice of the interlocutory order made by Judge Goodman (Tr. p. 26), the plaintiff failed to disclose by any amendment to his complaint or by any affidavit or otherwise any other act on the part of the Association which could be construed as a refusal to pay, other than the letter of December 21, 1943, which was admittedly received by the plaintiff on December 27, 1942. It is admitted in appellant's opening brief (p. 3) that the "plaintiff declined to amend his complaint". Plaintiff was given ample opportunity to amend his complaint, and, failing to avail himself thereof, it necessarily follows that there are no facts before this court, just as there were none before the District Court, which either expressly or impliedly place upon the Association any responsibility for plaintiff's delay in commencing the suit for a period of more than six months after the Association's refusal to pay.

Under these circumstances, the case at bar does not come within the rule of such cases as *Bollinger v. National*



*Fire Insurance Co.*, 25 Cal. (2d) 399, where the insurance company, through its attorneys, indulged in a course of conduct which either tended to delay or induced the insured to delay the filing of his action.

In the case at bar, the plaintiff, by his own conduct, uninfluenced in any way by the Association, failed to bring the action within the contractual period of limitation.

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**6. PLAINTIFF'S ARGUMENTS ARE NOT SUPPORTED BY HIS CITATIONS OF AUTHORITIES WHICH ARE INAPPLICABLE IN ANY EVENT TO THE FACTS IN THIS CASE.**

(a) Appellant claims that the plaintiff "being a beneficiary and not a member of defendant Fraternal Society was not bound by section 7 of the Articles of Incorporation" etc. (See App. Op. Br. p. 9.) The contract between George Gifford and the Association may be considered as having been entered into for the benefit of Houghton Gifford. (Sec. 1559, Civil Code.) However, Houghton Gifford cannot claim the benefits of the contract without assuming its burdens and recognizing its terms, covenants and conditions. When the certificate of membership was issued and delivered to and accepted by George Gifford (Tr. p. 3) it was agreed (Tr. p. 21) that "this certificate, the constitution, by-laws and articles of incorporation of said association and application for membership signed by said member and all amendments thereto shall constitute the agreement between said association and said member and shall govern the payment of benefits \* \* \* and shall bind said member and his beneficiary or beneficiaries".

The plaintiff cannot escape this unambiguous covenant on the part of George Gifford. The invocation and application of a contractual period of limitation does not involve the principle of forfeiture as suggested by counsel for appellant. (App. Op. Br. p. 9.) Respondent contends that plaintiff was bound by the contractual limitation of time as fixed in the constitution and by-laws. (Tr. p. 20.)

In *Ells v. Order of United States, etc.*, 20 Cal. (2d) 290, the membership certificate upon which the beneficiary relied did *not* contain any provisions expressly binding the beneficiary, such as there are in this case. (Tr. pp. 21 and 22.) Besides, the acts complained of by the insurance company in the *Ells* case were not performed by the beneficiary but by public officials without the knowledge of the beneficiary. In the case at bar the failure to bring suit in time is entirely attributable to the plaintiff beneficiary, and no one else.

*Bollinger v. National Fire Insurance Co.*, 25 Cal. (2d) 399, is not in point for the following reasons:

In the *Bollinger* case the insurance company engaged in a series of acts through its attorneys which were equivocal in character as the result of which the insured was misled to his disadvantage. The court declared in the *Bollinger* case (p. 411):

“It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.”

In the case at bar there is no averment in the complaint which asserts that the plaintiff was misled by any act of the Association or that the Association indulged in any equivocal acts which had a tendency to delay or induce the plaintiff to delay the commencement of an action to enforce his claims as a beneficiary. On the contrary, the Association's letter of refusal to pay any benefits to the plaintiff (Tr. p. 25) politely but firmly and unconditionally expresses "regret" that "*there is no liability on the part of the association*". Certainly, the plaintiff does not claim that he was misled by this advice although there is a suggestion on page 18 of the appellant's opening brief that the letter of denial of liability succeeded in lulling "the plaintiff into a situation whereby the plaintiff waited for a period of eight (8) months and three (3) days before filing his action to enforce the payment of this claim". We will discuss this phase of the matter later in this brief but at this point we assert that there is no evidence in the record to support any claim that the plaintiff was misled by the Association's letter of December 21, 1943, since it was the *only* communication the plaintiff received before he commenced his action belatedly, and he admits in his complaint that the "defendant has refused payment". (Tr. p. 5.)

In the *Bollinger* case, the court reaffirms the rule in support of which it cites many cases to the effect "*that unconditional denial of liability by the insurer after the insured has incurred loss and made claim under the policy gives rise to an immediate right of action*".

*Kendall v. Travelers, etc. Association*, 169 Pac. Rep. 751, is likewise inapplicable. In that case the court points out



the distinction which counsel for plaintiff overlooks, namely, the period of illness for which weekly payments were sought was a continuing period and the cause of action had not entirely accrued, while in the case at bar the cause of action arising out of the event of death and the unconditional denial of liability had actually accrued for more than eight (8) months prior to the commencement of the action, which, by the terms of the contract, plaintiff was required to bring within six (6) months from the denial of liability. It was with this thought in mind that the court in the *Kendall* case said:

“In most of these decisions, particularly *Egan v. Oakland Insurance Co.*, the injury for which indemnity was sought had fully passed, as in the Egan case a fire, and the cause of action had entirely accrued, while in the matter before us the claim was yet in the process of development.”

*Bennett v. Modern Woodmen*, 52 Cal. App. 581, is likewise not applicable to the case at bar for the reason that it involved a “peculiar” set of facts. Among these facts was the circumstance that the insured disappeared, and under the provisions of subdivision 26 of section 1963 of Code of Civil Procedure, seven (7) years had to elapse before the presumption of death could be indulged in. It is obvious that if the eighteen (18) months’ limitation could be invoked to run from the date of the original disappearance instead of the date when the presumption of death could be indulged in, suit would have been required before the presumption of death, following from the seven (7) years’ disappearance, had actually accrued. The court declared itself in favor of the principle contended for by



respondents in this case but refused to apply the principle due to the "peculiar" facts. This is what the court said in the *Bennett* case:

"It is undoubtedly the general rule that a condition in a policy of insurance providing that no recovery shall be had thereon unless suit be brought within a given time, *is valid if the time limited is, in itself, not unreasonable*; but to permit the defendant *under the peculiar facts of this case*, to successfully interpose the defense of either the provision in the certificate, or of the statute, would be to extend the rule of limitation too far."

(b) Plaintiff claims (App. Op. Br. p. 16) that the Association's letter dated December 21, 1943, was "not a refusal of the defendant to pay the claim" and that the time limitation of six (6) months did not run from its receipt by plaintiff on December 27, 1943. (Tr. p. 20.) The facts before the District Court and in the record do not support appellant's contention.

When the plaintiff filed his complaint on September 1, 1944 (Tr. p. 6), he alleged that the defendant had "*refused payment*". (Tr. p. 5.) How, when or in what manner the Association "*refused payment*" did not appear in the complaint. However, in the affidavit of T. G. Hagaman filed in support of the Association's motion for a summary judgment, the facts were alleged by which there was disclosed when and by what means the Association had refused to make payment of the plaintiff's demand. (Tr. p. 19.) In that affidavit it was alleged that "this defendant *refused* to pay the said claim and notified the plaintiff in writing of the *refusal* of the defendant to pay the claim

of plaintiff, and that the plaintiff received said notice of *refusal* of the defendant to pay the same on or about December 27, 1943 and that attached hereto \* \* \* is a full, true and correct copy of the said notice of *refusal*'.

The foregoing averment must be taken as admitted for two reasons: first, the plaintiff filed no affidavit controverting the averments set forth in Mr. Hagaman's affidavit; second, plaintiff admittedly declined to amend his complaint although the District Court gave him an opportunity to plead "by way of replication any pertinent facts in avoidance of the time limitation". (Tr. p. 26.)

In effect, appellant is seeking in his brief to introduce by implication an element which might have been predicated upon alleged facts had the plaintiff denied the averments set forth in Mr. Hagaman's affidavit or had the plaintiff filed an amended complaint or a replication as was suggested by the judge of the District Court. There are no such facts in the record.

It has been held that one who declines to amend his pleading when offered an opportunity to do so may not afterward be allowed to treat it as amended when no amendment has in fact been made.

*Carpentier v. Brenham*, 50 Cal. 549;

21 Cal. *Juris.*, sec. 130, p. 188;

*Central Credit Creditors' Assn. v. Seeley*, 91 Cal. App. 327.

Counsel for appellant, however, make the astounding, irresponsible and unwarranted statement that the Association by its letter of December 21, 1943, lulled "the plaintiff into a situation whereby the plaintiff waited for a

period of eight (8) months and three (3) days before filing his action" etc. (App. Op. Br. p. 18.) This unfounded statement finds no support in the record.

Appellant's counsel further suggest that the doctrine of equitable estoppel should be invoked against the Association (App. Op. Br. p. 20 et seq.), but they fail to point to any facts which were pleaded in plaintiff's complaint from which the principle of an equitable estoppel would flow.

Certainly, the letter of December 21, 1943, did not assert that the Association was investigating or would investigate the facts. It declared unequivocally that it "had investigated the facts". It disclosed that as a result of that investigation it concluded that death was *not* due to "external, violent and accidental means independent of all other causes" but that *on the contrary death was "due to natural causes"*. (Tr. p. 25.) There is no justification for claiming that these are straddling or lulling words. *The plaintiff was not asked to refrain from suing nor taking any means available to him to enforce forthwith any demands he then thought he had.*

Besides, if the plaintiff intended to rely upon an equitable estoppel to relieve him of contractual limitation, he was required to plead the facts to support such claim and to assert the claim itself. This the plaintiff failed to do in his original complaint and he failed to take advantage of the chance to do so by amendment to his complaint or by replication after the trial court gave him the opportunity to do so. (Tr. p. 26.)

The rule is firmly established in California, and in most other jurisdictions, that estoppel must be pleaded affirma-

tively in order to render it available on behalf of the litigant who invokes it. See

*Mitchell v. Cheney Slough Irrigation Company*, 57 Cal. App. (2d) 138;

*Cohen v. Metropolitan Life Ins. Co.*, 32 Cal. App. (2d) 337.

Since the plaintiff did not either plead or assert an estoppel as against the defendant in the District Court, he cannot contend for such a doctrine on appeal, particularly since the plaintiff had ample opportunity to amend his complaint to invoke the doctrine of estoppel after the trial court rendered its interlocutory order.

*Producers Holding Company v. Hill*, 201 Cal. 204;

*Metcalf v. Guercio*, 74 Cal. App. 637.

(c) Appellant claims that the Association's motion for summary judgment was premature because the bar of the claim of the plaintiff did not appear from the face of the complaint and had to be supplied by an affidavit which the Association filed in support of its motion.

This contention is fully and completely answered by the language of the Rules of Civil Procedure which are cited and discussed in subdivision 1 of our argument, *supra*. No further discussion upon this point seems necessary or proper.



**F. CONCLUSION.**

It is respectfully submitted that the appellant has presented no meritorious reasons for any reversal of the judgment of the District Court, and therefore the judgment should stand affirmed.

Dated, San Francisco,

November 1, 1945.

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NAT SCHMULOWITZ,

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No. 11,119

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HOUGHTON GIFFORD,

*Appellant,*

VS.

THE TRAVELERS PROTECTIVE ASSOCIATION  
OF AMERICA,

*Appellee.*

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Reply Brief of Appellant

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United States  
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HOUGHTON GIFFORD,

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VS.

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*Appellee.*

---

Reply Brief of Appellant

---

Appellee's counsel have not attacked or impugned the principles of law, argument or citation of authorities set forth in the appellant's brief, but seeks to brush them all blandly aside by the statement contained in paragraph 6 on page 6 of their brief, that "appellant's arguments are not supported by his citations of authority which are inapplicable in any event to the facts in the case."

They do not, however, point out any defect in the argument or show in any wise why the authorities are inapplicable to the facts in the case. We stand by the argument advanced in our opening brief and we respectfully submit that the authorities cited are in point and do support the argument.

On page 7 under the heading "E. Argument" appellee cites the provisions of rule 56-C and in effect cites himself out of court. The rule as there quoted by appellee's counsel is as follows: "the judgment sought shall be rendered forthwith if the *pleadings*, etc. show there is no genuine issue as to any material fact, etc." Here no answer of defendants was filed. Only the complaint of plaintiff was in file.

We again reiterate our contentions made under point 3 on page 24 that the "DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE, AND THEREFORE A JUDGMENT BASED ON SUCH MOTION WAS IN ERROR." See the cases on pages 24, 25, 26, 27 and 28 of appellant's opening brief; also *Bowers v. Rose Mfg. Co.*, 149 Fed.(2d) 613, decided by this very Circuit in April, 1945).

In that case the Court, on page 613, said:

"Since the complaint stated a cause of action *and no issue was joined, the case was not in a position for a summary judgment.*"

It has been very recently decided that Rule 56 does not invest the Court with power summarily to try factual issues but only authorizes summary judgment if it appears that there is a *complete absence of any genuine issue and all doubts thereon must be resolved against the moving party*; see

*Colley v. Igoe*, 8 Fed. Rules, Service, p. 862 (June 26, 1945);

*Toebelman v. Miss. Pipe Line Co.*, 130 F. (2nd) 1016;

*Hummel v. Riordan*, 56 Fed. Supp. 983;

*Whitaker v. Coleman*, 115 F. (2nd) 305;

*Sartor v. Ark. Gas Co.*, 321 U.S. 620-624-627-628 (88 L.E. 967, 972).



As was said in the *Colley v. Igoe* case, supra, "Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth; its purpose is not to cut litigants off from their right of trial by jury."

Again it has been said by the U. S. Circuit Court of Appeals, Second Circuit, April 26, 1945, as follows:

"Trial courts should exercise great care in granting motions for summary judgment and should not deny a litigant a trial where there is the slightest doubt as to the facts; see

*Dohler Co. v. U. S.*, 149 F.(2d) 130-135—Syl. 5 and 6."

At page 135, the Court in the *Dohler Company Case* said as follows:

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Cf. *Arenas v. United States*, 322 U.S. 419, 429, 433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. *Sartor v. Arkansas*

Natural Gas Corporation, 321 U.S. 620, 624, 64 S.Ct. 724, 88 L. Ed. 967.”

See also, along this line, the case of:

*Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co.*, 149 F.(2nd) 359,

where the first syllabus is as follows:

“The court should not grant summary judgment for defendants on the ground that the affidavits submitted in support of the claim are incredible, that the witness has been impeached, or that if a verdict were rendered for the plaintiffs the court would be compelled to set it aside. If there is some admissible evidence in support of the claim the court should not grant summary judgment.”

In this very Circuit on June 30, 1944, this court had occasion to consider affidavits in support of a summary motion and Justice Mathews in denying the motion held that statements of legal conclusions in the moving affidavits should be disregarded as well as all statements made on information and belief. See

*State of Washington v. Maricopa County*, 140 F. (2nd) 871.

#### APPELLEE'S CASES

On page 10 of appellee's brief counsel cites several cases in support of his point that an insurer may limit by contract the time within which suit may be brought subject only to the condition that the interval is not unreasonable. The first case cited, *Gmuser v. Ocean Co.*, 57 Cal. App.(2d) 979, definitely holds that the plaintiff can recover even

though the action was not filed within the period of time fixed by the policy at two years and two days; see pages 982 and 984.

The next case cited by counsel, *Penn. R.R. Co. v. Mid-state Co.*, 21 Cal.(2d) 243, simply upheld the validity of the waiver of the statute of limitations by the shipper in favor of the railroad carrier and on page 247 the court says "obviously a statute of limitations may be extended or waived" (citing cases).

Several of the other cases cited by counsel, to-wit, *Bennett v. Modern Woodmen*, 52 Cal. App. 581 and *Bolinger v. National Fire Ins. Co.*, 25 Cal.(2d) 399, have already been cited and discussed in our opening brief; see Op. Brief, pp. 11, 13, 19 and 23.

The whole argument of appellee's counsel overlooks the allegations contained in the plaintiff's complaint which are set forth on page 5, paragraph 8 of appellant's opening brief to-wit:

"That plaintiff has fully complied with all the terms and conditions of said certificate of membership and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford and demanded payment of the Five Thousand Dollars (\$5,000.00) insurance provided for in said certificate."

That such allegations are sufficient to defeat a motion for summary judgment, see,

*Topping v. Fry*, 147 Fed.(2d) 715.

That case likewise holds that the defense of "laches" may not be raised by motion to dismiss;—this must also be true as to the defense of the period of limitation.



**THE LETTER OF DEFENDANT OF DECEMBER 21, 1943**

The appellee lays great stress upon defendant's letter, Exhibit C, which was a portion of the moving papers on the motion for summary judgment which is set forth on page 25 of the record and also on page 13 of appellee's brief.

A careful reading of this letter discloses that it is not a reply to any *claim for payment by the plaintiff*. Its very opening paragraph discloses that it is a reply made by the appellee to the notice of the death of the plaintiff's father, sent by the mother of plaintiff, and that it was a statement that the defendant "*in accordance with the request made by your mother investigated the facts in reference to such death.*"

Under the well-known rule of evidence it must be assumed on the hearing of such a motion for a summary judgment that no claim for payment by the plaintiff had then been made, because if defendant were in possession of such claim for payment it should have incorporated such claim in the affidavit; if any such claim had been made by plaintiff, the failure of defendant to produce it and incorporate it in its moving papers must be construed against it, to-wit, either that there was no such claim or that if there was that it was adverse to defendant's contention.

Appellee's counsel lay much stress upon the allegation in the plaintiff's complaint that "the defendant has refused payment" and seek, without justification, to tie this allegation to the letter of December 21st, 1943. For on page 17 of their brief counsel make the contention that this letter was the only communication the plaintiff re-



ceived and that therefore (sic) this letter must be deemed to be a refusal of payment. *There is nothing in the record to show when the plaintiff presented his claim for payment nor when the payment was refused.* The allegation in paragraph 9 of the complaint (trans. p. 5), "defendant has refused payment of said sum or any part thereof and the same and all thereof remains due, owing and unpaid," is merely the pleader's usual statement of facts necessary to show the breach of the obligation of the defendant to make payment.

It may well be that plaintiff's claim for payment was made at a much later date than the letter of December 21st, 1943. Such facts are evidentiary and must await plaintiff's proof at the trial.

Appellee's counsel makes much of the point that the plaintiff failed to disclose by any amendment to his complaint or by any affidavit any other act on the part of the defendant or that the plaintiff relied upon any acts or conduct of the defendant which might equitably estop the defendant from pleading the bar of the period of limitations. See page 14, appellee's brief.

As we pointed out in our opening brief on page 26, the plea of limitation is personal to the defendant. It might, as debtors often do, have waived the privilege and the bar of limitations does not appear on the face of the complaint.

It is not incumbent or necessary for the plaintiff to anticipate that the defendant will plead the bar of the period of limitation and therefore it is not necessary for him to anticipate such a defense and set up facts or cir-

cumstances which might toll the running of such limitation period. Such matters may be set up by the plaintiff in a replication to an answer which contains such a plea but the plaintiff is not obliged to anticipate such a defense and meet it before it is set up by defendant's answer.

Appellee's brief seeks to distinguish the case of *Ells v. Order of United States*, 20 Cal.(2nd) 290, which was cited on pages 10, 14, 15 and 16 of appellant's opening brief by claiming on page 16 of their brief that in that case the membership certificate did not contain any provisions expressly binding the *beneficiary* such as there are in this case. We find no such distinction in that case.

Moreover appellee has misquoted the provisions of the certificate of membership on page 15 of their brief wherein they state "this certificate, the constitution, by-laws and articles of incorporation of said Association and application for membership signed by said member and all amendments thereto shall constitute the agreement between said Association and said member and shall govern the payment of benefits and shall bind said members and his beneficiary or beneficiaries."

Counsel has left out from this quotation several lines which materially change the import of the clause, to-wit, the words as follows: "And any changes, additions or amendments to said constitution, by-laws or articles of incorporation hereafter duly made shall bind said member and his beneficiary or beneficiaries."

In any event we contend that regardless of the language of the certificate, the *beneficiary* under such a certificate in a fraternal society is not bound by Section 7 of the articles of incorporation, constitution and by-laws to bring

his action within six months as therein provided. (See Opening Brief, pages 9-16, inclusive.)

That the period of limitations within which an action must be brought contained in a policy of insurance is not a conclusive bar to the plaintiff filing a suit after the expiration of such period has squarely been held in the case of

*Thompson v. The Phenix Insurance Co.*, 34 L.Ed. 408 (see 6th, 7th, 8th and 9th syllabus).

In that case the court reversed the judgment of the lower court, which dismissed the bill before answer was filed and in doing so used the following language (page 414):

“What the fact may be, in respect to the authority of the agents, or whether the plaintiff had the right to rely upon those assurances and promises, and, if he did, whether the Company’s rights were thereby affected, are questions not now to be decided. *Their determination will depend upon the answer and the evidence at the trial.*”

Under the principles and authorities cited in our opening brief and contained herein, we maintain that the judgment based upon the defendant’s motion for a summary judgment and a dismissal of the complaint with prejudice was erroneous, premature, without foundation in law, and should be reversed.

Respectfully submitted,

DUNNE & DUNNE,  
J. D. LEDERMAN,

*Attorney for Appellant  
Houghton Gifford.*





No. 11126

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,  
a corporation,

Appellee.

---

**APOSTLES ON APPEAL**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---

FILED

1945

PAUL A. O'BRIEN  
CLERK



**No. 11126**

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

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Upon Appeal from the District Court of the United States  
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Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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LAWLER FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

Standard Oil Building

Los Angeles 15, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

## CITATION

United States of America, ss.

To Standard Oil Company of California, a corporation,  
and Messrs. Lawler, Felix and Hall, its attorneys,  
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of July, A. D. 1945, pursuant to an order allowing appeal filed on May 31, 1945, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 3490-BH, Central Division, wherein United States of America is appellant and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ben Harrison, United States District Judge for the Southern District of California, this 31st day of May, A. D. 1945, and of the Independence of the United States, the one hundred and sixty-ninth.

BEN HARRISON

U. S. District Judge for the Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 31st day of May, 1945, together with copy each of Petition for Appeal. Assignment of Errors and Order Allowing Appeal. Lawler, Felix & Hall, John M. Hall, Marcus Mattson, by John M. Hall, Attorneys for Appellee.

[Endorsed]: Filed May 31, 1945. [2]

In the District Court of the United States for the  
Southern District of California  
Central Division

In Admiralty No. 3490-BH

STANDARD OIL COMPANY OF CALIFORNIA,  
a corporation,

Libelant,

v.

UNITED STATES OF AMERICA and KEYSTONE  
SHIPPING COMPANY, a corporation,

Respondents.

### LIBEL IN PERSONAM

To the Honorable, the Judges of the United States District Court, for the Southern District of California, Central Division:

The libel of Standard Oil Company of California, a corporation, against United States of America and Keystone Shipping Company, a corporation, respectfully shows:

1. Libelant Standard Oil Company of California is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in California.

2. Respondent Keystone Shipping Company is now and at all times herein mentioned has been a corporation organized and existing [3] under and by virtue of the laws of one of the states of the United States.

3. The vessel "S. S. Egg Harbor" is now and at all times herein mentioned has been employed as a merchant

vessel and owned and operated by United States of America, by and through War Shipping Administration, a department and agency of United States of America.

4. Said vessel "S. S. Egg Harbor" is within this district, to wit, at the port of San Pedro, California.

5. This libel is filed under the provisions of the Suits In Admiralty Act (March 9, 1920, c. 95, 41 Stat. 525, Title 46 U. S. C., Sec. 741-752 inc.) and libelant hereby elects, in accordance therewith, to have this suit proceed in accordance with the principles of a libel in rem.

6. On or about April 14, 1943 said "S. S. Egg Harbor" was in the port of San Pedro, California, and was destined upon a voyage upon the high seas and on waters within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, to wit, from said port of San Pedro, California, and from El Segundo, California to Point Wells, Washington. Libelant was then and there and at all times herein mentioned the owner of certain petroleum products as follows:

60,933.31 barrels of Standard diesel furnace oil,

63,789.52 barrels of Standard gasoline.

7. Libelant made and entered into with respondent United States of America, by and through said War Shipping Administration, an agreement wherein and whereby United States of America agreed for a valuable consideration to convey said 60,933.31 barrels of Standard diesel furnace oil and said 63,789.52 barrels of Standard gasoline separately and in good order and con-



dition on board said "S. S. Egg Harbor" to and unload said petroleum products at Point Wells, Washington.

8. That thereafter and on or about April 17, 1943 said [4] 60,933.31 barrels of Standard diesel furnace oil were loaded upon said "S. S. Egg Harbor" at San Pedro, California in good order and condition; that thereafter on April 18, 1943 said 63,789.52 barrels of Standard gasoline were loaded on said "S. S. Egg Harbor" at El Segundo, California in good order and condition.

9. That said vessel "S. S. Egg Harbor" thereafter proceeded on her voyage and respondents, not regarding their duty in that respect nor the promise and undertaking aforesaid, did not so convey and deliver said petroleum products in such or any good order and condition, but on the contrary said respondents negligently and without due diligence allowed and caused part of each of said petroleum products to become commingled, mixed and adulterated one with the other, and upon reaching said Point Wells, Washington 23,632.45 barrels of said Standard diesel furnace oil and 21,098.02 barrels of said Standard gasoline had become so commingled, mixed and adulterated that by reason of all of the foregoing libellant has sustained damage to the amount of Fifty Thousand Dollars (\$50,000.00).

10. That said respondent Keystone Shipping Company is and was in all things herein mentioned and at all times herein set forth the agent of War Shipping Administration and of respondent United States of America.

11. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law according to the courts and practice of this Honorable Court in causes of admiralty and maritime jurisdiction issue against said United States of America and said Keystone Shipping Company, requiring each of them to appear and answer the foregoing libel;

2. That this court shall decree the payment by said respondents to libelant of the sum of Fifty Thousand Dollars (\$50,000.00), [5] together with such other sum or sums as the proof shall show libelant to be entitled to, together with interest thereon as by law provided and libelant's costs; and

3. That libelant have such other, additional and further relief as may seem to this court just and proper.

STANDARD OIL COMPANY OF CALIFORNIA,  
a corporation,

By Geo. J. O'Brien

LAWLER, FELIX & HALL  
MARCUS MATTSON

Proctors for Libelant. [6]

[Verified.]

[Endorsed]: Filed Mar. 7, 1944. [7]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT, UNITED STATES  
OF AMERICA

Respondent, United States of America, for itself alone, answers the libel in personam and admits, denies and alleges as follows:

I.

Admits the allegations in Paragraph 1 of the libel.

II.

Admits the allegations in Paragraph 2 of the libel.

III.

Admits the allegations in Paragraph 3 of the libel.

IV.

Admits the allegations in Paragraph 4 as true at the time [8] of the filing of the libel on or about March 7, 1944.

V.

Admits the allegations in Paragraph 5 of the libel.

VI.

Admits the allegations of Paragraph 6 of the libel except that respondent is without knowledge or information sufficient to form a belief as to the truth of the averment relating to the ownership by libelant of certain petroleum products as stated and denies such allegations on that ground.

VII.

Admits that respondent by War Shipping Administration entered into an agreement with libelant for the car-

riage of certain petroleum products and alleges that said agreement is a written agreement entitled "Tanker Voyage Charter Party", dated April 14, 1943, of which, as respondent is informed and believes and therefore alleges, libelant has a copy and that the carriage of said petroleum products by respondent was to be on the S. S. "Egg Harbor" with destination Point Wells, Washington; denies all other allegations in Paragraph 7 except as expressly admitted.

### VIII.

Admits that certain petroleum products of libelant in the form of diesel oil and gasoline were loaded upon the S. S. "Egg Harbor" at San Pedro, California, and El Segundo, California, on or about the times stated in the libel but denies all other allegations except as expressly admitted.

### IX.

Denies each and every allegation of Paragraph 9 of the libel except that respondent admits that the S. S. "Egg Harbor" thereafter proceeded on her voyage to Point Wells, Washington, and did arrive at Point Wells, Washington; denies that libelant [9] sustained damage in the sum of \$50,000 or in any sum whatever.

### X.

Admits the allegations in Paragraph 10 of the libel in so far as respondent, Keystone Shipping Company, was at all times mentioned therein an agent of respondent under a regular War Shipping Administration Agency Agreement.



XI.

Admits the allegations of Paragraph 11 of the libel.

For a First Affirmative Defense, Respondent Alleges:

I.

That the agreement referred to in the libel in personam as being entered into between libelant and respondent was a written agreement in form entitled "Tanker Voyage Charter Party", being Form No. 104 of the War Shipping Administration; that said agreement was and is dated as of April 14, 1943, and provided for the charter of the S. S. "Egg Harbor" by Standard Oil Company of California as charterer from respondent, United States of America, acting by and through the War Shipping Administration as owner, for carriage of a cargo of gasoline and/or diesel oil from San Pedro and/or El Segundo, California, to Safe U. S. Pacific Northwest; that reference is hereby made to said charter party for full particulars.

II.

That pursuant to said charter party certain gasoline and diesel oil was carried on the voyage contemplated to Point Wells, Washington.

III.

That Paragraph 19 of said charter party, Part II, reads as follows:

"19. Cleaning.—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the [10] Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into

shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, nor for any consequences arising out of shipping more than one grade of cargo."

#### IV.

That by reason of the premises if said petroleum products so shipped on said voyage became commingled, mixed or adulterated one with the other as alleged by libellant, it was a "consequence arising out of shipping more than one grade of cargo" within said Paragraph 19 of the charter party.

For a Second Affirmative Defense, Respondent Alleges:

#### I.

Incorporates Paragraphs I and II of its First Affirmative Defense herein the same as though fully set forth at length.

II.

That Paragraph 7 of said charter party, Part II, reads as follows: [11]

"7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connection, where delivery of the cargo shall be taken by the Charterer or its Consignee. The Vessel shall supply her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or Consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel."

And Paragraph 20(a) of said charter party, Part II, reads as follows:

"20(a). Act of God, etc.—The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage, or delay or failure in performing hereunder, arising or resulting from:—any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless



caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other [12] navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, Shipper or Consignee of the cargo, their agents or representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charter, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: —Act of God; act of war; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion."

### III.

That by reason of the premises if said petroleum products so shipped on said voyage became commingled,



mixed or adulterated one with the other as alleged by libelant, it arose "without the [13] actual fault or privity of the owner", respondent herein, in a pumping operation within Paragraphs 7 and 20(a) of said charter party.

Wherefore, respondent, United States of America, prays that libelant take nothing; that its libel in personam be dismissed; for costs and for such other and further relief as may be proper.

Dated: July 25, 1944.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

Proctors for Respondent, United States  
of America

[Endorsed]: Filed Jul. 25, 1944. [14]

[Title of District Court and Cause.]

### STIPULATION

It is stipulated by libelant and respondent, United States of America, that it may be deemed at the trial of this suit that competent and credible witnesses called by libelant have testified to the following facts:

1. That the charter party and bills of lading, photo-stats of which are annexed hereto, are the documents which were executed and issued in connection with the carriage of the cargo involved in this suit from San Pedro and El Segundo to Point Wells.

2. That libelant was the owner of the 60,933.31 bbls. of Standard diesel furnace oil taken on board the S. S. Egg Harbor at San Pedro on April 17, 1943 and of the 63,789.52 bbls. of Standard gasoline taken on board such vessel at El Segundo on [15] April 18, 1943; that said furnace oil and gasoline were each fully refined and readily marketable as such.

3. That the "customary freight unit" for the oil and gasoline involved in this suit was the barrel.

4. That the 60,933.31 bbls. of Standard diesel furnace oil loaded on the S. S. Egg Harbor at San Pedro on April 17, 1943 and the 63,789.52 bbls. of Standard gasoline loaded on such vessel at El Segundo on April 18, 1943, were received on board the vessel uncontaminated.

5. That upon the arrival of the S. S. Egg Harbor at Point Wells and immediately prior to the commencement of unloading operations on April 23, 1943 a visual in-

spection of the cargo showed no contamination of the Standard gasoline. The Standard diesel furnace oil and the Standard gasoline had theretofore been carried in separate tanks in said vessel.

6. That the portion of the cargo thus carried by said S. S. Egg Harbor to Point Wells plus the products with which it was mixed in libelant's shore tanks, all of which was subsequently found to be so contaminated as to be unmerchantable and require refinery reprocessing and which was returned to libelant's El Segundo refinery in the S. S. Egg Harbor for reprocessing was: 25,507 bbls. of said Standard diesel furnace oil, contaminated with gasoline, and 19,479 bbls. of said Standard gasoline, contaminated with standard diesel furnace oil. (No stipulation is made herein with respect to the time or times when, or place or places where, said products were ascertained to be contaminated, or with respect to the place or places where said contamination took place.)

7. That the damage incurred by libelant as a result of the contamination of said Standard diesel furnace oil and Standard gasoline is computed in the following manner: [16]

Value in merchantable condition at Los Angeles area of part of cargo which was contaminated	\$ 88,117.53
Add freight and insurance to Point Wells	13,295.02
	<hr/>
Value in merchantable condition at Point Wells of part of cargo which was contaminated	\$101,412.55

Gross value at Los Angeles area of products salvaged from con- taminated part of cargo	\$69,072.00
Deduct handling charges at Point Wells	\$ 482.92
Deduct freight and insurance to Los Angeles area	13,041.65
Deduct reprocessing cost at refinery in Los Angeles area	3,293.00
Total	<hr/> 16,817.57
Net value of products salvaged	<hr/> 52,254.43
Total damage	<hr/> \$ 49,158.12

Dated: Los Angeles, California, December 6, 1944.

CHARLES H. CARR

LILLICK, GEARY, McHOSE & ADAMS

By A. F. Mack, Jr.

Proctors for Respondent, United States  
of America

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant [17]



# TANKER VOYAGE CHARTER PARTY

## PART I

CHARTER PARTY made as of **April 14**, 1943, at **Philadelphia, Pa.**

between the UNITED STATES OF AMERICA, acting by and through the WAR SHIPPING ADMINISTRATION (hereinafter called the "Owner") of the good **American** **SS** **"FOG HARBOR"** (hereinafter called the "Vessel") and **T HEARD OIL COMPANY OF CALIFORNIA** (hereinafter called the "Charterer")

This Charter Party consists of this Part I and Part II on the reverse hereof. Unless in this Part I otherwise provided, all of the provisions of Part II shall be part of this Charter Party as though fully incorporated herein.

Net Registered Tonnage of Vessel **8,128** **Classed** **AI American Bureau of Shipping**

Loaded Draft of Vessel Applicable for this Voyage **50** ft **0 1/2** in salt water

Capacity of **138,000** bbls (of 42 American measured gallons at 60° F each) or **Diesel Oil** **terms of 1940 Rev. of Gasoline or (10% more or less, vessel's option.)**

Now **\_\_\_\_\_** **Loaded** in all **main tanks**

Loading Port **San Pedro and/or El Segundo, California**

Cargo **Gasoline and/or Diesel Oil**

Discharging Port **safe U. S. Pacific Northwest**

Freight Rate **W. S. A. Rate applicable** Payable at **Phil delphia, Pa.**

Readiness Date **April 12, 1943** Cancelling Date **May 12, 1943**

Hours for Loading & Discharging **96** Demurrage per hour **\$125.00** Lay 2 cargoes **\_\_\_\_\_**

### SPECIAL PROVISIONS

1. This Charter Party cancels and supersedes Charter Party dated April 5, 1943, Contract No. 268.

IN WITNESS WHEREOF the parties herein have executed this agreement in duplicate, one of the said originals to be retained by the Charterer.

Witness the signature of **Walter E. Max**

UNITED STATES OF AMERICA  
BY WAR SHIPPING ADMINISTRATION  
BY KEYSTONE SHIPPING CO. Agent

**Walter E. Max, Secretary**

STANDARD OIL COMPANY OF CALIFORNIA

[18]



## PART II

[illegible]

Fig. 1. Subgroups.





## Bill of Lading No.

Shipped in apparent good order and condition by Standard Oil Companyon board the AmericanSTEAMSHIP  
MEXICO

"BO" 1000

whereof L. S. Mannis master, at the Port of Los Angeles, CaliforniaPart Cargo Oil STEAMSHIP 1000 100020,000.001000.00 1000.0020,000.001000.00ALL OIL 20.0

to be delivered at the Port of \_\_\_\_\_, or so near thereto as the

vessel can safely get, always afloat, unto \_\_\_\_\_

pursuant to terms of contract/charter, dated \_\_\_\_\_

It is declared on this bill of lading affecting  
this cargo that the cargo is not to be  
discharged or delivered in any manner or the  
revelation of its contents in any manner to an  
unauthorized person is prohibited by law.

in witness whereof the master has signed \_\_\_\_\_

bills of lading of

this tenor and date, one of which being accomplished, the others will be void.

Dated at San Francisco, California this 29th day of APRIL 1918

This bill of lading shall have effect subject to the provisions of the  
Carriage of Goods by Sea Act of the United States, Approved April 16,  
1906, which Act is hereby incorporated herein, as if recited  
in full, and the carrier, the Standard Oil Company of California, its  
servants, agents, and subcontractors, shall be bound by its provisions as  
to the liability of the carrier and the bill of lading be repugnant  
to the Act in any extent, such term shall be void to that extent,  
but no further.

L. S. Mann  
MASTER.



Bill of Lading No.

Shipped in apparent good order and condition by **Standard Oil Co. of California**on board the **American**STEAMSHIP  
MOTORSHIP" **RED HARBOR** "whereof **L. C. Olsen**is master, at the Port of **El Segundo, California**

Part Cargo Standard Gasoline (Summer Grade) in Bulk:

**63,792.52**

Gross 42 Gallon Barrels at 60° F.

**7,353.34**

Long Tons

**60.1**

A.P.I. Gravity

to be delivered at the Port of

.. or so near thereto as the

vessel can safely get, always afloat, unto

pursuant to terms of contract/charter, dated **as agreed**in witness whereof the master has signed **Olsen (1)**

bills of lading of

this tenor and date, one of which being accomplished, the others will be void.

Dated at **El Segundo, California**

this

**18 th.**

day of

**April, 1943,**

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**L. C. Olsen**  
MASTER





[Title of District Court and Cause.]

ORDER FOR DISCONTINUANCE AGAINST  
RESPONDENT, KEYSTONE SHIPPING  
COMPANY

It appearing that respondent, Keystone Shipping Company, a corporation, has never been served with process or appeared herein, and that respondent, Keystone Shipping Company, is neither an indispensable nor a necessary party to this suit; and good cause appearing therefor;

It Is Ordered that this suit shall be deemed to have been discontinued as against respondent, Keystone Shipping Company, a corporation, without prejudice to the continued prosecution of this suit by libellant against respondent, United States of America, and without costs against libellant.

Dated: Jan. 30, 1945.

BEN HARRISON

Judge of the United States District Court.

Judgment Entered Jan. 30, 1945. Docketed Jan. 30, 1945. Book 30, page 547. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Jan. 30, 1945. [22]

[Title of District Court and Cause.]

AMENDMENT TO LIBEL IN PERSONAM, AND  
ORDER PERMITTING THE FILING THERE-  
OF

By leave of the Court, libelant amends its libel in personam on file herein, by eliminating paragraph 9 of said libel and substituting in place thereof the following paragraph:

"9. That said vessel S. S. "Egg Harbor" thereafter proceeded on her voyage and respondents, not regarding their duty in that respect nor the promise and undertaking aforesaid, did not so convey and deliver said petroleum products in such or any good order and condition, but on the contrary failed to exercise due diligence to make said vessel seaworthy or properly man or equip or supply said vessel or make the parts of said vessel in which [23] cargo was carried fit or safe for the reception of the same or its carriage or preservation, and failed to properly or carefully load, handle, stow, carry, care for or discharge said cargo, as a result whereof a part of the oil and gasoline comprising said cargo, to-wit, approximately 23,131 bbls. of said Standard diesel furnace oil and approximately 8,140 bbls. of said Standard gasoline, became commingled and mixed so that when the same were delivered to libelant at said Point Wells, Washington, the following occurred: a quantity of said Standard diesel furnace oil so commingled and contaminated with gasoline

as to be unmerchantable and require refinery reprocessing was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a tank which already contained approximately 2,376 bbls. of uncontaminated Standard diesel furnace oil, whereby the contents of said tank became contaminated, and a quantity of said Standard gasoline so commingled and contaminated with diesel furnace oil as to be unmerchantable and require refinery reprocessing was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a tank which already contained approximately 11,339 bbls. of uncontaminated Standard gasoline, whereby the contents of said tank became contaminated; that from the circumstances attending the delivery of said cargo respondent might reasonably have understood or inferred that said cargo would be received by libelant from said vessel into shore tanks already partly full; that by reason of the contamination of said cargo and the contamination of the products already in said [24] tanks when the contaminated cargo was added thereto libelant has been damaged in the sum of \$50,000.00."

LAWLER, FELIX & HALL  
JOHN M. HALL  
MARCUS MATTSON

By John M. Hall

Proctors for Libelant [25]

It Is Stipulated, that the libel herein shall be deemed to have been amended by libelant as hereinbefore stated, and that respondent, United States of America, shall, without the filing of any additional pleadings be deemed to have denied each and every allegation of said paragraph 9 as amended, except that the S. S. "Egg Harbor" thereafter proceeded on her voyage to Point Wells, Washington, and did arrive at Point Wells.

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant

CHARLES H. CARR

LILICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States  
of America

It is so ordered.

Dated, January ....., 1945.

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Judge of the United States District Court

[Endorsed]: Filed Jan. 30, 1945. [26]



[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER PERMIT-  
TING LIBELANT TO AMEND LIBEL TO  
CONFORM TO THE PROOF

To Respondent, United States of America and to Hon.  
Charles H. Carr, United States Attorney, Robert  
E. Wright, Assistant United States Attorney, A. F.  
Mack, Jr., and Lillick, Geary, McHose & Adams,  
Proctors for Said Respondent

Please take notice that libelant will bring the fol-  
lowing motion on for hearing before the Honorable Ben  
Harrison, Judge of the District Court, in the courtroom  
of said Judge in the United States Post Office and Court  
House Building, 312 North Spring Street, Los Angeles,  
California, on the 1st day of March, 1945, at 9:30 o'clock  
in the forenoon on that date, or soon thereafter as [27]  
proctor for libelant may be heard.

Said motion will be based on the pleadings and the  
evidence in this cause.

Motion for an Order Permitting Libelant to  
Amend Libel to Conform to the Proof.

Pursuant to Admiralty Rule 23 of the Supreme Court  
of the United States libelant moves this Honorable Court  
for an order permitting libelant to amend its libel here-  
in in the following particulars:

By adding before the prayer of said libel a new para-  
graph reading as follows:

"12. The agreement made and entered into by  
and between libelant and respondent, United States  
of America, by and through War Shipping Admin-  
istration, as aforesaid, provided that damages for a

breach thereof should include all provable damages, and all costs of suit, and attorney fees incurred in any action thereunder. In the prosecution of this suit it has been and will be necessary for libelant to procure the services of attorneys and on that account to incur attorney fees."

By adding to the prayer of said libel a new paragraph reading as follows:

"4. That libelant have and recover from respondents the amount of its attorney fees incurred herein."

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant

Authority for this Motion:

Benedict on Admiralty, 6th ed., Vol. 2, sec. 355 [28]

The undersigned consent that the following motion may be heard at the time and place stated in the foregoing notice.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARV, McHOSE & ADAMS, and  
A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States  
of America.

[Endorsed]: Filed Feb. 26, 1945. [29]

[Title of District Court and Cause.]

## OPINION

### Appearances:

Lawler, Felix & Hall, Esqs. and Marcus Mattson, Esq.,  
800 Standard Oil Building, Los Angeles, California,  
Proctors for Libelant,

Charles H. Carr, Esq., United States Attorney, U. S.  
Post Office & Court House, Los Angeles, California, and  
Lillick, Geary, McHose & Adams, Esqs. and Augustus F.  
Mack, Jr., Esq., 634 South Spring Street, Los Angeles,  
California. Proctors for the Respondents.

This is a proceeding in admiralty wherein libelant seeks damages under the Suits in Admiralty Act (46 USCA 741-752) for the comingling of part of a cargo of gasoline and diesel oil shipped on the tanker "Egg Harbor", a vessel owned and operated by the United States of America, by and through the War Shipping Administration.

This case presents two broad questions of law, namely:

1. Does the Carriage of Goods by Sea Act apply to the shipment involved? [30]
2. Did the War Shipping Administration exceed its power in executing a charter party wherein it created a liability against the United States for all provable damages including attorney's fees?

According to the evidence the "Egg Harbor", a Swan Island tanker, on its maiden voyage to Point Wells, Washington, received from the libelant at San Pedro, California, 60,933.31 barrels of marketable Standard diesel furnace oil, and at El Segundo, California, 63,789.52 barrels of marketable Standard gasoline. Upon arrival at Point



Wells, Washington, tests were taken by means of lowering small containers into the tanks and observing and smelling the contents, failed to disclose any contamination. The libelant also took samples at the dock end of the hose when the pumping of both products began and at spaced intervals thereafter. By this means, it was discovered about three hours after pumping commenced, that contaminated gasoline was being discharged. The pumps were immediately shut down but later pumping was resumed, and the contamination continued. Thereafter, the diesel oil was unloaded separately without contamination. After the diesel oil was unloaded, the remainder of the gasoline was removed free from contamination. Later, on the following day, it was discovered through laboratory tests that part of the diesel oil had been contaminated with gasoline. As a result of this co-mingling 8,140 barrels of Standard gasoline and 23,131 barrels of diesel oil were so contaminated by the admixture as to require reprocessing. And in addition thereto, 11,339 barrels of Standard gasoline and 2,376 barrels of Standard diesel oil already in the shore tanks into which the contaminated products were pumped became so contaminated by this admixture as to also require reprocessing.

All the above oil products had to be reprocessed at the libelant's plant in El Segundo, California, as they had no market value in their contaminated condition at Point Wells, Washington. If libelant [31] is entitled to recover damages for all the oil contaminated it would be entitled to recover the sum of \$49,158.12. On the other hand, if it is entitled to recover only for that portion of the cargo damaged, it would be entitled to the sum of \$32,914.56.

The first question to be determined is whether the Carriage of Goods by Sea Act covers the shipment of oil involved. The libelant contends that it does, while the re-



spondent holds to the contrary, because the vessel was operating under a charter for the full capacity of the vessel and therefore respondent was free to contract as a private party. Under this reasoning the parties were in the relationship of a bailor and bailee. Respondent then refers to paragraph 19 of the charter party which provides:

"Except as may otherwise be indicated in Part I, the vessel shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo."

It naturally follows that if the Carriage of Goods by Sea Act does not apply, the libel must be dismissed because of the above provision. But it appears clear to me that said act (46 USCA §1300 et. seq.) clearly applies and the rights and liabilities of the parties are controlled thereby. Paragraph 25 of the charter party is entitled "Clause Paramount" and reads as follows:

"All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further."

The Carriage of Goods by Sea Act is made applicable to the carriage of goods between ports of the United States if the "bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports" contains "an express statement

that it shall be subject to the provisions of this [32] Chapter and Section 25 of Title 49." Reading paragraph 25 of the charter party in connection with this language in the Carriage of Goods by Sea Act leads to the inescapable conclusion that there was a sufficient incorporation of the Act to make it a part of the contract of carriage.

Respondent relies strongly on the *G. R. Crowe* 294 F. 506. In that case action was brought to recover for loss of gas and oil caused by leakage. The cargo was shipped under a charter party for the full capacity of the vessel. The court held that the agreement between the parties for the full capacity of the vessel amounted to a contract for private carriage and therefore the Harter Act, a predecessor to the Carriage of Goods by Sea Act, did not apply. This view has been substantiated by numerous other decisions both prior and subsequent to the *Crowe* case. *Hine et al. v. New York & Bermudez Co.*, 68 F. 920; *The Fri*, 154 F. 333; *Lake Steam Shipping Co. v. Bacon*, 129 F. 819; *The Royal Sceptre*, 187 F. 224; *The Rokeby*, 202 F. 322; *The Elizabeth Edwards*, 27 F. (2d) 747. While a common element exists between these cases and the one at bar in that the parties have contracted for the full capacity of the vessel and have thereby placed the respondent in the position of a private carrier, there also exist fundamental differences. In the instant case there was an express incorporation of the Carriage of Goods by Sea Act into the charter party,—an element entirely lacking in the cases cited by the respondent. Furthermore, under the Carriage of Goods by Sea Act, which is controlling in this case, there is a provision giving effect to its incorporation in the charter party. This provision is not found in the Harter Act under which the *Crowe* and like cases were decided.

Even under the Harter Act cases have recognized that it may be incorporated into contracts where it would not otherwise govern by its own force. In *Framlington Court*, 69 F. (2d) 300, it was stated:

“Having incorporated the Harter Act by reference in the charter, the parties are bound to take it with its burdens as well as its benefits and it is controlling.” [33]

In *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F. (2d) 194, the court said:

“The charter party now under consideration gave the charterer the full capacity of the ship *Munamar*, and as such it was not a common carrier, and the Harter Act . . . would not of its own force have applied but the contracting parties have expressly made it a part of their contract, which they were at liberty to do.”

See also *The Vermont*, 47 Fed. Supp. 877; *The Agwimoon*, 24 F. (2d) 864. It is therefore apparent that the parties could do exactly what they did do, namely: make the Carriage of Goods by Sea Act a part of their charter notwithstanding the fact that the respondent was contracting as a private carrier. It would appear therefore that paragraph 19, in so far as it attempts to relieve respondent from its own responsibilities, is in conflict with the terms of the Carriage of Goods by Sea Act and is inapplicable. (46 USCA §1303 (8)).

Having determined that the Carriage of Goods by Sea Act applies, the responsibility of the respondent under the Act must then be determined.



Title 46 USCA §1303 provides as follows:

- (1). The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
  - (a) Make the ship seaworthy;
  - (b) Properly man, equip, and supply the ship;
  - (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
- (2). The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

And §1304 of Title 46 USCA places the burden of proving the exercise of due diligence upon the carrier whenever the loss has resulted from unseaworthiness.

At the outset it should be noted that in undertaking to transport oil the respondent charged itself with a high degree of care. As stated in *The Turret Crown*, 297 F. 766: [34]

"Oil is much more difficult to contain than water. Small leaks in a water tank tend to correct themselves by the formation of rust; whereas oil not only does not cause rust, but tends to dissolve rust . . . ."

*The Arakan*, 11 F. (2d) 791; *American Linseed Co. v. U. S.*, 40 F. (2d) 657.

This statement becomes more important when considered in the light of the testimony of two expert witnesses as to the necessity of using spectacle flanges in blocking off one tank in the vessel from another. A spectacle flange consists of two metal fittings connected by bolts and sepa-



rated by a flat, round piece of sheet metal. When installed in a length of pipe this metal flange acts as a dam by blocking off the flow of liquid. While the vessel was equipped with some spectacle flanges, those were not closed. The vessel was laid out in nine separate tanks. Each of these tanks was connected by a series of pipes running between them. The cargo in this case was distributed as follows: The Standard gasoline was put in tanks 2, 3, 4 and 9, and the diesel oil was put in tanks 5, 6, 7 and 8. On the pipes connecting these tanks were "double cross-over valves", which were operated from the deck of the vessel by means of a wheel attached to a rod extending down to the valves. These valves were the only means of preventing the cargo of one tank from becoming mixed with another. According to the testimony of the chief pumper, he personally set these valves so that the "tell tale" indicated they were closed, and he also chained and sealed them. The chief pumper revealed that certain pressure tests were made of the pipes, connections and valves on the trip down from the fitting docks to San Pedro. Taking these statements as true, there was still no way of being certain that the valves would block off the two cargoes. Rust, nails, or any type of foreign matter could have prevented the valves from setting properly. Furthermore, it was necessary to rely on the valves remaining untouched by the members of the crew if we assume they were properly closed when the products were loaded. On the other hand, the use of spectacle flanges would have guaranteed the separate shipment of the cargo and removed the element of risk. Accordingly, in the light of the precarious [35] nature of the cargo, the fact that it was the ship's maiden voyage, the uncertainty of the proper setting of hand valves, and the inevitable reliance on the good judgment of the crew not to alter the

valves, it is my opinion, that in not using spectacle flanges which could have been installed expeditiously and inexpensively, and not closing those that were installed, the respondent was guilty of a failure to exercise due diligence to make the ship seaworthy for the carriage of oil and gasoline.

Mr. Justice Gray in *The Sylvia*, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241, stated:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

And again in *The Bill*, 47 F. Supp. 969, we find the following:

"The ship owner and the crew must . . . be held to familiarity with the particular construction and design of the ship and its apparatus, and with the characteristics and effect of particular cargoes which the vessel carried."

The respondent at no time made any explanation accounting for the contamination. Its representatives inspected the vessel shortly after the contamination was discovered and had full opportunity to ascertain the cause thereof but would admit nothing, except that "the cross-over valves" on tank 5 were found partially open. It is significant that forthwith one of the mates was relieved from duty but no explanation for such action was given.

Even if the failure to use spectacle flanges instead of "double cross-over" valves might not be deemed as lack of due diligence in making the vessel seaworthy, the respondent under said Section 1303 (2) of Title 46 USCA had the responsibility of properly and carefully discharging the cargo and this it did not do. Having received the diesel

oil and gasoline in marketable condition, the failure to deliver it in like condition would indicate that it had not been discharged properly and carefully in the absence of any explanation to the contrary. The Joseph Hock, 70 F. (2d) 259-260.

In order to recover for the loss resulting from the [36] reprocessing of this oil and gasoline the libellant must bring itself within the rule governing special damages in contract cases as expressed in 9 Am. Jur.—Carriers—Section 789, p. 909, as follows:

“Under certain circumstances, damages may be recovered as within the contemplation of the parties, although they are in excess of those which would ordinarily be considered the natural and probable consequence of the default of the carrier. Special damages may be recovered for the damages arising out of special circumstances known to the parties. In all such cases, the carrier must have had notice of the special circumstances which give rise to the damages.

. . . It is not always necessary, however, that the special facts actually within the contemplation of the parties should be mentioned in the negotiations, or in express terms made a part of the contract. Whenever they are known to the carrier, under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. It is not essential that the intended use and application of the goods to be carried should, in all cases, be expressly brought to the carrier's notice at the time they are received, but the carrier may be liable whenever such special use could be reasonably inferred from the known circumstances.”



A similar statement of the law will be found in *Simons-Mayrant Co. v. Atlantic Coast Line R. Co.*, 207 Fed. 387.

Under this rule, in the absence of anything in the charter party to the contrary, it would only be necessary to find that at the time the respondent undertook to transport the oil and gasoline it could be reasonably inferred from the known circumstances that contaminated products from the vessel might and would likely be pumped into tanks already containing uncontaminated products. In the light of the nature of the product, the methods used in discharging it, and the experience of the parties concerning the unloading and storage of petroleum products it might be reasonably assumed that this disposition of the cargo was within the contemplation of the carrier.

But the respondent points to paragraph 7 of the charter party which reads in part: [37]

"The cargo shall be pumped . . . out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee."

The respondent claims that this relieves the carrier from liability after the cargo left the permanent hose connections. That would be true if the act causing the damage occurred after the cargo had left the permanent hose connections. But here the damage to the cargo occurred on board the vessel,—a place where under paragraph 7 and the Carriage of Goods by Sea Act, the carrier was still responsible for the care of the cargo. The fact that the damage did not result until the cargo had passed the permanent hose connections could in no way relieve the carrier from the original breach. The charter party is one instrument and should be read as a whole (*Emmons Coal*



Mining Corp. v. Sir R. Ropner & Co., 31 F. (2d) 948; Nicholson Transit Co. v. Nicholson Universal S. S. Co., 60 F. (2d) 90; The Framlington Court, 69 F. (2d) 300) and therefore paragraph 7 should be read in connection with paragraph 34 which states:

“Damages for breach of this Charter shall include all provable damages, . . .”.

Thus, the damage to the oil in the storage tank being provable as a breach of the undertaking of the carrier, paragraph 7 should not be so construed as to limit recovery as provided in said paragraph 34.

The charter party under consideration was prepared by the War Shipping Administration for the carriage of Petroleum and/or its products in bulk on vessels. It is on a printed form headed “Form No. 104—Warshipoilvoy 6/1/42”. Use of this form was required by an order of the War Shipping Administration published in 46 Code of Federal Regulations §303.2. This being the case the charter party must be strictly construed against the respondent. The Helen Barnet Gring, 48 F. (2d) 629; The Pensacola, 263 Fed. 661; Compania de Navigacion La Flecha v. Brauer et al., 168 U. S. 104, 18 S. Ct. 12, 42 L. Ed. 398.

There seems to be no serious question that attorney's fees [38] may be recovered as part of the damages if so stipulated in the contract. 25 C. J. S. p. 531-3; U. S. Fidelity and Guaranty Co. v. Highway Eng. C. Co., 51 F. (2d) 894; Ghirardelli v. Peninsula Properties Co., 16 Cal. (2d) 494, 107 P. (2d) 41.

Having determined that the charter party creates a liability upon respondent for all damages including attorney's fees as a part thereof, in the event the parties thereto were private contractors, it must now be decided whether

the War Shipping Administration had the authority to bind the United States under said charter party.

In approaching this problem it must be borne in mind that if Congress has not under proper legislation waived immunity from suit, such cannot be accomplished by an administrative agent. (*Munro v. U. S.*, 303 U. S. 36, 58 S. Ct. 421, 82 L. Ed. 633; *U. S. v. Shaw*, 309 U. S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *Stanley v. Schwalbey*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960; *Jones v. Tower Production Co.*, 120 F. (2d) 779). While this is true, in none of these cases did Congress go so far in waiving sovereign immunity as it did in the Suits in Admiralty Act and the Merchant Marine Act.

Recently the Supreme Court has expressed the view that when the Government enters the field of commercial activities a liberal approach will be taken to the question of immunity from suit. (*F. H. R. v. Burr*, 309 U. S. 242, 60 S. Ct. 472, 84 L. Ed. 716; *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784; *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595). In *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471, it was stated:

"For when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. . . . Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under Sec. 2 of the Suits in Admiralty Act."

Section 207 of the Merchant Marine Act of 1936 (46 USCA 1117) later transferred to the War Shipping Administration under [39] Executive Order No. 9054,

February 8, 1942, (7 Fed. Reg. 837) provides in part as follows :

"The Commission may enter into such contracts, upon behalf of the United States, . . . as may, in its discretion, be necessary to carry on the activities authorized by this chapter, . . . in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

While my attention has not been called to any decision interpreting this provision of the law, it appears to me that the language thereof is clear and explicit and if it means what it appears to say, the War Shipping Administration has the same authority as any private corporation to enter into contracts and if it has that authority, it has the power to bind the United States by the terms of said contract. This would appear to be in conformity with the purpose of the act as set forth in Section 1101 of Title 46 USCA and its predecessors the U. S. Shipping Board Merchant Fleet Corporation.

In an opinion of the Attorney General of the United States dated March 23, 1943, among other things he stated :

"In view of my conclusion that the restrictive provisions here involved were not intended to apply to the situations described above, it is unnecessary for me to consider the effect, in this connection, of Section 207 of the act of June 29, 1936 (49 Stat. 1985, as amended) and of Executive Orders No. 9054 (7 Fed. Reg. 837) and No. 9244 (*ibid.*, 7327), which authorize the War Shipping Administration to enter into contracts "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." I may note, how-



ever, that section 207 . . . has been construed to authorize departures from the usual rules governing the making of Government contracts when the unusual or business character of the activities involved so require (Comptroller General's Decisions, A-51647, March 27, 1941, and B-15611, January 12, 1942)."

In House Report No. 2168, 75th Congress, 3rd Session, referred to in the opinion of the Attorney General, I find the following language:

"Under the act, the Maritime Commission [40] has all the general and implied powers of a business corporation."

See also Benedict on Admiralty, Vol. I, 6th Ed. page 452.

It appears that when the War Shipping Administration drew up the form which constitutes the charter party herein in question (46 Code of Fed. Reg. 303.2), it was exercising the power conferred upon it by Congress. It was certainly the intent of Congress to permit the War Shipping Administration to freely enter into charter parties and in entering into such agreements knew that the ordinary and usual responsibilities and liabilities must be assumed by it. It knew that the government was entering a field wherein it would be in competition with private carriers and in order to compete it would have to assume the same liabilities as private carriers.

Furthermore, when Congress under the provision of said Sections 741-752 of Title 46 USCA waived the sovereign immunity of the United States and permitted suits to be brought against the government to the same extent as



such suits could be maintained against private parties, it expressly subjected the government to liability for all damages resulting from the operation of government owned vessels. In said sections it has in no way limited its liability and it would appear that under such circumstances all elements of damages could be recovered. When attorney's fees are made by agreement an element of damages, I see no logical reason why the United States should not be liable therefor to the same extent as a private party. It has assumed the liability of an ordinary carrier and should not be permitted to evade it.

I therefore hold that the United States of America having lawfully assumed the responsibilities fixed by said paragraph 34 of the charter party, it became liable for damages as therein provided. I hereby find that the sum of \$8,000.00 is a reasonable amount to be allowed to said libelant as attorney's fees to be added to the sum of \$49,158.12, the amount allowed for the contamination of all the libelant's [41] oil products. Libelant is also allowed interest on said sum of \$49,158.12, at the rate of 4% per annum from April 23, 1943, together with costs herein incurred.

Libelant is directed to promptly prepare findings and decree in accordance with this opinion.

Dated: This 17 day of February, 1945.

BEN HARRISON  
Judge

[Endorsed]: Filed Feb. 17, 1945. [42]

[Title of District Court and Cause.]

AMENDMENT TO LIBEL IN PERSONAM, AND  
ORDER PERMITTING SUCH AMENDMENT.

By leave of the Court, libelant amends its libel in personam on file herein to conform to the proof as follows:

By adding before the prayer of said libel a new paragraph reading as follows:

"12. The agreement made and entered into by and between libelant and respondent, United States of America, by and through War Shipping Administration, as aforesaid, provided that damages for a breach thereof should include all provable damages, and all costs of suit, and attorney fees incurred in any action thereunder. [43] In the prosecution of this suit it has been and will be necessary for libelant to procure the services of attorneys and on that account to incur attorney fees."

By adding to the prayer of said libel a new paragraph reading as follows:

"4. That libelant have and recover from respondents the amount of its attorney fees incurred herein."

LAWLER, FELIX & HALL,

JOHN M. HALL,

MARCUS MATTSON,

By JOHN M. HALL

Proctors for Libelant

It is ordered that the libel in personam herein be amended in accordance with the foregoing.

Dated, March 5, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Mar. 5, 1945. [44]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial and was tried on the merits commencing on January 30, 1945 before the Honorable Ben Harrison, a Judge of the above entitled Court, at his courtroom in the Federal Post Office and Courthouse Building in the City of Los Angeles, California. Messrs. John M. Hall, Marcus Mattson and Wallace L. Kaapcke appeared as proctors for libelant, and Mr. A. F. Mack, Jr., and Assistant United States Attorney Robert E. Wright appeared as proctors for respondent, United States of America, which had theretofore appeared herein by filing an answer to the libel.

It appearing that respondent, Keystone Shipping Company, [45] a corporation, had never been served with process or appeared herein, and that said respondent was neither an indispensable nor a necessary party to this suit, and good cause appearing therefor, it was ordered by the Court, without objection on the part of respondent, United States of America, that this suit be deemed to have been discontinued as against respondent, Keystone Shipping Company, a corporation, without prejudice to the continued prosecution of this suit by libelant against respondent, United States of America.

Pursuant to stipulation of the parties, it was also ordered that paragraph 9 of the libel should be deemed amended in accordance with an amendment filed, and that respondent, United States of America, without the filing of any additional pleading should be deemed to have denied each and every allegation of said paragraph 9 as amended, except the allegation that the S. S. "Egg Harbor" pro-



ceeded on her voyage to Point Wells, Washington, and arrived at Point Wells.

Having heard the proofs of the respective parties and considered the same and the records, papers and stipulations in the cause and all exhibits as well as the deposition of Lawrence C. Olsen, which was offered and received in evidence without objection, and the cause having been submitted for consideration and decision, and briefs having been filed, the Court, after deliberation, having heretofore made and rendered its opinion and having, upon motion of libelant, ordered that the libel be further amended to conform to the proof by adding a new paragraph, numbered 12, before the prayer, and a new paragraph, numbered 4, to the prayer, makes the following findings of fact and states the following as its conclusions of law thereon: [46]

### Findings of Fact

The Court makes the following findings of fact:

1. Libelant, Standard Oil Company of California, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in California. Respondent, Keystone Shipping Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of one of the states of the United States, and at all of said times and in all things herein mentioned was the agent of War Shipping Administration and of respondent, United States of America.

2. The vessel S. S. "Egg Harbor" is and at all times herein mentioned was employed as a merchant vessel, and is and was owned and operated by United States of America, hereinafter referred to as "respondent", by and



through War Shipping Administration, a department and agency of United States of America. Said vessel, at the time of the filing of the libel herein, was at the port of San Pedro, California, within this District.

3. The libel herein was filed under the provisions of the Suits in Admiralty Act (46 U. S. C. A., secs. 741-752 incl.). Libelant has elected, in accordance therewith, to have this suit proceed in accordance with the principles of a libel in rem.

4. On or about April 14, 1943, said S. S. "Egg Harbor", being at the port of San Pedro, California, was destined upon a voyage upon the high seas and on waters within the admiralty and maritime jurisdiction of the United States and of this Court, to wit, from said port of San Pedro, California, and from El Segundo, California, to Point Wells, Washington. Libelant was then and there and at all times herein mentioned the owner of certain petroleum products, viz., 60,933.31 barrels of Standard diesel furnace oil [47] and 63,789.52 barrels of Standard gasoline.

5. Under date of April 14, 1943, libelant made and entered into with respondent by and through said War Shipping Administration, an agreement known and designated as a "Tanker Voyage Charter Party", hereinafter referred to as the "charter". A true copy of said charter is annexed to the stipulation on file herein which is dated December 6, 1944, and said charter was and is in the form known as "Warshipoilvoy" prescribed by order of the War Shipping Administration dated June 5, 1942 (7 Federal Register 4386 et seq.).

6. Pursuant to said charter, on April 17, 1943, said 60,933.31 barrels of Standard diesel furnace oil were loaded on said S. S. "Egg Harbor" at San Pedro in an uncontaminated condition, and on April 18, 1943 said 63,-

789.52 barrels of Standard gasoline were loaded on said S. S. "Egg Harbor" at El Segundo in an uncontaminated condition. When taken on board said vessel said diesel furnace oil and gasoline were each fully refined and readily marketable as such. At all times herein mentioned the customary freight unit for said diesel furnace oil and gasoline was the barrel. At the time said diesel furnace oil and said gasoline were taken on board said vessel bills of lading were issued therefor. A true copy of the bill of lading issued for said diesel furnace oil, which is dated April 17, 1943, and a true copy of the bill of lading which was issued for said gasoline, which is dated April 18, 1943, are annexed to the stipulation on file herein which is dated December 6, 1944. Respondent, for valuable consideration, by said charter and bills of lading agreed that said vessel would proceed with said cargo to Point Wells, Washington, and there deliver said cargo to libelant.

7. Said vessel thereafter proceeded on her voyage [48] with said cargo and arrived at Point Wells, Washington, on or about April 23, 1943. On or about April 23, 24 and 25, 1943 said cargo was discharged from said vessel into libelant's shore storage tanks.

8. Before and at the beginning of said voyage, and also during said voyage, respondent failed to exercise due diligence to make said vessel seaworthy, or properly man or equip or supply said vessel or make the parts of said vessel in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and failed to properly or carefully handle, carry, keep, care for or discharge said cargo all as required of respondent by said charter and bills of lading, and negligently and improperly handled, carried, cared for and discharged said cargo. As a direct and proximate result of the foregoing, and each thereof, and not as a consequence arising out of

shipping more than one grade of cargo, the following occurred: A part of the diesel furnace oils and gasoline comprising said cargo, to-wit, 23,131 barrels of said Standard diesel furnace oil and 8,140 barrels of said Standard gasoline became commingled and mixed while on board said vessel so that when the same were delivered to libelant at Point Wells, Washington, the same were so contaminated as to be unmerchantable and require refinery reprocessing, and a quantity of said Standard diesel furnace oil thus contaminated with gasoline was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a shore tank which already contained approximately 2,376 barrels of uncontaminated Standard diesel furnace oil, whereby the contents of said shore tank became contaminated, and a quantity of said Standard gasoline thus contaminated with diesel furnace oil was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a shore tank which already contained approximately 11,339 barrels of uncontaminated [49] Standard gasoline, whereby the contents of said shore tank became contaminated. From the circumstances which would and did attend the delivery of said cargo respondent at the time said charter was made should reasonably have understood or inferred and should have contemplated that said cargo would be received by libelant from said vessel into shore storage tanks already partly full. The value in merchantable condition at Point Wells of all of the diesel furnace oil and gasoline which became contaminated was \$101,412.55. As thus contaminated these products had no market value at Point Wells, or elsewhere. In order to salvage the same and recover marketable substances therefrom it was necessary for libelant to return and libelant did return the same to libelant's refinery for reprocessing. The value of



the substances salvaged from said contaminated products by such reprocessing at libelant's refinery was \$52,254.43, after deduction of handling, transportation, insurance and reprocessing costs. The value in merchantable condition at Point Wells of the diesel furnace oil and gasoline thus contaminated which were a part of the cargo (exclusive of said products contaminated in said shore tanks) was \$64,168.20, and the value of the substances salvaged from the latter was \$31,253.64, after deduction of handling, transportation, insurance and reprocessing costs. All quantities of said diesel furnace oil and gasoline herein referred to were and are herein computed at a temperature of 60° Fahrenheit, which was and is the temperature commonly adopted for the measurement of these petroleum products in commercial and industrial transactions.

9. As a direct and proximate result of said commingling and mixing of said diesel furnace oil and gasoline occurring on board said vessel, as aforesaid, libelant has been damaged as follows: In the sum of \$32,914.56 on account of the diesel furnace [50] oil and gasoline contaminated on board the vessel, and in the further and additional sum of \$16,243.56 on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when said contaminated products from the vessel were added thereto, making the total damage to libelant on account of said commingling and mixing the sum of \$49,158.12, to which latter sum there should be added as damages interest thereon from April 24, 1943, the date when said products should have been delivered to libelant in an uncontaminated condition, until paid, at the rate of 4% per annum, and to which sum there should also be added as damages the sum of \$8,000, the same being the attorney's fee reasonably incurred by libelant on account of the services of the attorneys, reasonably employed by libelant in this suit. [51]



## Conclusions of Law

Upon the foregoing findings of fact, the Court separately states its conclusions of law as follows:

1. The War Shipping Administration was duly authorized on behalf of respondent, United States of America, to enter into said charter with libelant.

2. The Carriage of Goods by Sea Act (46 U. S. C. A. secs. 1300-1315 incl.) was by said charter and bills of lading made applicable to said carriage of said diesel furnace oil and gasoline, and imposed upon respondent, United States of America, the duty to exercise due diligence before and at the beginning of said voyage to make said vessel seaworthy and to properly man, equip and supply said vessel, and the duty to make all parts of said vessel in which said products were carried fit and safe for their reception, carriage and preservation, and the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge said products.

3. Said duties imposed upon respondent, United States of America, as such carrier were not impaired or curtailed by paragraph 7 or paragraph 19 or paragraph 20(a) of Part II of said charter, or by any other provisions of said charter.

4. Had said S. S. "Egg Harbor" been privately owned and possessed a libel in rem in admiralty might have been commenced by libelant at the time this suit was commenced and might have been thereafter maintained.

5. This suit was commenced and has been maintained in all respects in compliance with requirements of the Suits in Admiralty Act (46 U. S. C. A. secs. 741-752 incl.) pertaining to the commencement and maintenance of suits in admiralty against the United States of America.

6. Libelant is entitled to recover from respondent, [52] United States of America, as damages the sum of \$49,-158.12, together with interest at the rate of 4% per annum upon the latter sum from April 24, 1943 until said sum shall have been paid and the judgment therefor shall have been satisfied, together with the further and additional sum of \$8,000 as and for the attorneys' fee reasonably incurred by libelant herein and under said charter proper to be awarded to libelant as damages. In addition to said damages libelant is entitled to recover from respondent, United States of America, its taxable costs herein.

Dated this 16 day of Mar., 1945.

BEN HARRISON

Judge [53]

The foregoing is approved as to form.

LAWLER, FELIX & HALL,  
JOHN M. HALL,  
MARCUS MATTSON,

By JOHN M. HALL

Proctors for Libelant

CHARLES H. CARR,

United States Attorney

ROBERT E. WRIGHT,

Assistant United States Attorney

LILLICK, GEARY, McHOSE &  
ADAMS, and A. F. MACK, JR.

By .....

Proctors for respondent. United States of America.

Entered Mar. 16, 1945. Book C.O. 31. Page 332.  
Edmund L. Smith, clerk; by Murray E. Wire, deputy.

[Endorsed]: Filed Mar. 16, 1945. [54]

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA CENTRAL DIVISION

In Admiralty No. 3490-BH

STANDARD OIL COMPANY OF CALIFORNIA, a  
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA and KEYSTONE  
SHIPPING COMPANY, a corporation,

Respondents.

DECREE

This cause came on regularly for trial and was tried on the merits commencing on January 30, 1945, before the Honorable Ben Harrison, a Judge of the above entitled Court, at his courtroom in the Federal Post Office and Courthouse Building in the City of Los Angeles, California. Messrs. John M. Hall, Marcus Mattson and Wallace L. Kaapcke appeared as proctors for libelant, and Mr. A. F. Mack, Jr. and Assistant United States Attorney Robert E. Wright appeared as proctors for respondent, United States of America, which had theretofore appeared herein by filing an answer to the libel. [55]

It appearing that respondent, Keystone Shipping Company, a corporation had never been served with process or appeared herein, and that said respondent was neither an indispensable nor a necessary party to this suit, and good cause appearing therefor, it was ordered by the Court, without objection on the part of respondent, United States of America, that this suit be deemed to have been discontinued as against respondent, Keystone Shipping Com-



pany, a corporation, without prejudice to the continued prosecution of this suit by libelant against respondent, United States of America.

Pursuant to stipulation of the parties, it was also ordered that paragraph 9 of the libel should be deemed amended in accordance with an amendment filed, and that respondent, United States of America, without the filing of any additional pleading should be deemed to have denied each and every allegation of said paragraph 9 as amended, except the allegation that the S. S. "Egg Harbor" proceeded on her voyage to Point Wells, Washington, and arrived at Point Wells.

Having heard the proofs of the respective parties and considered the same and the records, papers and stipulations in the cause and all exhibits as well as the deposition of Lawrence C. Olsen, which was offered and received in evidence without objection, and the cause having been submitted for consideration and decision, and briefs having been filed, the Court, after deliberation, having heretofore made and rendered its opinion and having, upon motion of libelant, ordered that the libel be further amended to conform to the proof by adding a new paragraph, numbered 12, before the prayer, and a new paragraph, numbered 4, to the prayer, and having made and stated its findings of facts and conclusions of law thereon, now makes its decree in favor of libelant and against respondent, United States of America, by which it is [56]

Ordered, Adjudged and Decreed that libelant have and recover of and from respondent, United States of America, the sum of \$49,158.12, together with interest thereon at the rate of 4% per annum from April 24, 1943 until said sum shall have been paid and this judgment therefor shall have been satisfied, said interest to the date of this



decree amounting to \$3712.51, together with the further and additional sum of \$8,000 on account of attorneys' fees incurred by libelant; and it is also

Ordered, Adjudged and Decreed that in addition to the damages aforesaid libelant have and recover of and from respondent, United States of America, libelant's costs herein taxed in the sum of \$28.00.

Dated, this 16 day of Mar., 1945.

BEN HARRISON  
Judge [57]

The foregoing is approved as to form.

LAWLER, FELIX & HALL,  
JOHN M. HALL,  
MARCUS MATTSON,  
By JOHN M. HALL  
Proctors for Libelant

CHARLES H. CARR,  
United States Attorney  
ROBERT E. WRIGHT,  
Assistant United States Attorney  
LILLICK, GEARY, McHOSE &  
ADAMS, and A. F. MACK, JR.  
By .....

Proctors for respondent, United States of America.

Judgment entered Mar. 16, 1945. Docketed Mar. 16, 1945. Book CO #31, page 342. Edmund L. Smith, clerk; by Murray E. Wire, deputy.

[Endorsed]: Filed Mar. 16, 1945. [58]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER CORRECT-  
ING INADVERTENT OMISSION FROM THE  
DECREE AND TO MAKE SUCH DECREE  
CONFORM TO THE TRUTH

To Respondent, United States of America, and to Hon-  
orable Charles H. Carr, United States Attorney,  
Robert E. Wright, Assistant United States Attor-  
ney, A. F. Mack, Jr., and Lillick, Geary, McHose  
& Adams, Proctors for Respondent:

Please Take Notice that libelant will bring the follow-  
ing motion on for hearing before the Honorable Ben  
Harrison, Judge of the District Court, either in chambers  
or in open court, and at such time as may be convenient  
to the Court and proctor for libelant, or as soon thereafter  
as said proctor may be heard.

Said motion will be based on the Findings of Fact and  
Con- [59] clusions of Law and Decree in this cause.  
The authorities supporting said motion are annexed here-  
to.

Motion for an Order Correcting Inadvertent  
Omission From the Decree and to Make Such  
Decree Conform to the Truth

Libelant moves this Honorable Court for an order  
correcting in the following particulars and nunc pro tunc  
an inadvertent omission from the Decree herein, so that  
said Decree shall conform to what was actually deter-  
mined by the Court:

To insert in the blank in the next to the last paragraph of said decree the figures 3712.51 so that the clause in said decree containing said blank, which now reads as follows:

“said interest to the date of this decree amounting to \$.....,”

shall read:

“said interest to the date of this decree amounting to \$3712.51,”

Dated, April 6, 1945.

LAWLER, FELIX & HALL  
JOHN M. HALL  
MARCUS MATTSO

By John M. Hall  
Proctors for Libelant [60]

#### AUTHORITIES SUPPORTING MOTION

The Court has inherent power to correct a judgment at any time to make it conform to the truth, i. e. to conform to what was actually determined by the Court.

Ex parte Marks, 136 Fed. 168 (C.C.A. 9, 1905)

This may be done nunc pro tunc.

Mellon v. St. Louis Union Trust Co., 240 Fed. 359 (C.C.A. 8, 1917)

It is never too late for the Court to “correct inadvertences, clerical errors, omissions, mere forms in its judgments, and the like.”

New River Collieries Co. v. United States, 300 Fed. 333, 334 (N.J. 1924, affirmed in 262 U.S. 341)

Even after the term has expired, it has been held that the Court may correct its judgment so as to allow interest theretofore omitted by the terms of the judgment.

Kahn v. Herold, 163 Fed. 947 (C.C.A. 3, 1908)  
New River Collieries Co. v. United States, *supra*.

A judgment may always be reformed for the purpose of correcting computations made under it, regardless of whether the term at which it was entered has ended.

A. J. Woodruff & Co. v. United States, 154 Fed. 861 (N.Y. 1896) [61]

Thus, where a mortgage debt was ascertained and reported by the master as bearing interest from a certain date, and the report was approved by the Court, but the decree, as entered, allowed interest from a different date, the Court on petition corrected this as a manifest clerical mistake.

Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co., 84 Fed. 744 (Va. 1898)

In the case at bar it is even more apparent that the order prayed for should be made. No modification is called for; merely the filling in of a blank. When filled in, such blank will make the decree conform to what was actually determined by the Court. As shown by the preceding clause, the Court awarded interest from April 24, 1943 until paid. To fill in the blank in line 6 would merely state the amount of such interest which had accrued to the date of the decree. [62]

We waive notice of the hearing of the foregoing Motion, whether in open court or in chambers.

Dated, March 26, 1945.

CHARLES H. CARR  
United States Attorney



ROBERT E. WRIGHT

Assistant United States Attorney

A. F. MACK, JR.

LILLICK, GEARY, McHOSE & ADAMS

By A. F. Mack, Jr.

Proctors for Respondent, United States  
of America.

[Endorsed]: Filed Apr. 6, 1945. [63]

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[Title of District Court and Cause.]

ORDER CORRECTING NUNC PRO TUNC IN-  
ADVERTENT OMISSION FROM DECREE TO  
MAKE SUCH DECREE CONFORM TO THE  
TRUTH

Upon libelant's motion, notice of which has been  
waived in writing by proctors for respondent, United  
States of America, and

It appearing that the Decree herein contains an in-  
advertent omission, hereinafter referred to, the correction  
of which will make said Decree conform to what was  
actually determined by this Court in and by said Decree;  
therefore it is

Ordered that the Decree herein, dated March 16, 1945,  
be and it is hereby corrected nunc pro tunc as of the  
date thereof so that the clause in the next to the last  
paragraph of said Decree, which clause now reads as  
follows: [64]

"said interest to the date of this decree amounting  
to \$.....,"

shall read:

"said interest to the date of this decree amounting to \$3712.51,"

Dated, April 6th, 1945.

BEN HARRISON

Judge.

[Endorsed]: Filed Apr. 6, 1945. [65]

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[Title of District Court and Cause.]

### PETITION FOR APPEAL

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division:

Petitioner, United States of America, respondent herein, prays that it may be permitted to take an appeal from the final decree entered in this case on March 16, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith.

Dated at Los Angeles, California, May 31, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States  
of America

[Endorsed]: Filed May 31, 1945. [66]

[Title of District Court and Cause.]

### ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of United States of America, respondent herein, for an appeal from the final decree entered in this case on March 16, 1945, and from the whole thereof, and on consideration of the Assignment of Errors filed herewith, and good cause appearing therefor,

It Is Ordered that the appeal herein be allowed as prayed for, and

It Is Further Ordered that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith sent to the United States Circuit Court of Appeals for the Ninth Circuit, and [67]

It Is Further Ordered that no bond for costs on appeal is required of respondent.

Dated: May 31, 1945.

BEN HARRISON

United States District Judge

[Endorsed]: Filed May 31, 1945. [68]

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[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

United States of America, respondent herein, assigns the following errors in these proceedings:

1. The District Court erred in rendering a decree for libelant in any particular, in any sum, or at all.

2. The District Court erred in holding that the War Shipping Administration was duly authorized and em-

powered on behalf of respondent, United States of America, to enter into and execute the charter of April 14, 1943, with libelant, particularly in regard to, but not limited to, Paragraph 34 concerning damages for breach of the charter.

3. The District Court erred in holding that the Carriage of [69] Goods by Sea Act was by the charter and bills of lading made applicable to the carriage of diesel furnace oil and gasoline in question.

4. The District Court erred in holding that Paragraph 25 of the charter prevailed over other paragraphs and terms of the charter modifying Paragraph 25 or conflicting therewith.

5. The District Court erred in holding that respondent's first affirmative defense, based upon Paragraph 19 of the charter, was not applicable and did not constitute a defense to the libel.

6. The District Court erred in holding that respondent's second affirmative defense, based upon Paragraphs 7 and 20(a) of the charter, was not applicable and did not constitute a defense to the libel.

7. The District Court erred in applying the incorrect rule and measure of damages.

8. The District Court erred in holding that libelant was entitled to the full amount of damages pertaining to the diesel furnace oil and gasoline in the sum of \$49,158.12.



9. The District Court erred in not holding that, if entitled to damages, libelant was not entitled to damages on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when contaminated products from the vessel were added thereto, such damages being in the sum of \$16,243.56.

10. The District Court erred in finding that respondent at the time the charter was made should reasonably have understood or contemplated that the cargo would be received by libelant from the "Egg Harbor" into storage tanks already partly full.

11. The District Court erred in not finding that libelant failed to mitigate damages by refusing all further discharge of [70] both diesel furnace oil and gasoline until appropriate laboratory tests had been made and the results known when contamination of the gasoline was first discovered by libelant about 4:30 P. M. on April 23, 1943.

12. The District Court erred in not finding that no diesel furnace oil was contaminated by respondent.

13. The District Court erred in finding that the contents of libelant's shore tanks in question were uncontaminated before discharge from the S. S. "Egg Harbor" commenced.

14. The District Court erred in finding that respondent failed to exercise due diligence to make the vessel seaworthy by not using spectacle flanges during the voyage and discharge.

15. The District Court erred in holding that War Shipping Administration was duly authorized and empowered on behalf of respondent, United States of America, to contract in Paragraph 34 of the charter for attorney's fees as an item of damages for breach of charter.

16. The District Court erred in holding that libelant was entitled to attorney's fees in any sum or at all as damages.

17. The District Court erred in finding that if libelant were entitled to attorney's fees as damages the sum of \$8,000 was reasonable or reasonably incurred for attorney's fees.

18. The District Court erred in admitting evidence relevant to attorney's fees over the objection of respondent that attorney's fees were not specifically pleaded as a portion of the damages claimed, that the question of attorney's fees as a portion of such damages had not been previously considered in the case and that attorney's fees were not a proper item of damages under the Suits in Admiralty Act.

19. The District Court erred in holding that attorney's fees [71] were recoverable or proper as damages under the Suits in Admiralty Act.

Dated: May 31, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

Proctors for Respondent

[Endorsed]: Filed May 31, 1945. [72]

[Title of District Court and Cause.]

STIPULATION FOR USE OF ORIGINAL RE-  
PORTER'S TRANSCRIPT AND EXHIBITS  
ON APPEAL

It Is Hereby Stipulated between libelant and respondent, United States of America, through their respective proctors, that the originals of the following may be used in the appeal herein in lieu of copies, to-wit:

- 1) Reporter's transcript of the entire proceedings at the trial.
- 2) All exhibits introduced at the trial by either of the parties.

Dated: June 30, 1945.

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant [78]

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

By A. F. Mack, Jr.

Proctors for Respondent

It is so ordered

BEN HARRISON

Judge

[Endorsed]: Filed Jul. 2, 1945. [79]

[Title of District Court and Cause.]

AFFIDAVIT OF A. F. MACK, JR.

State of California

County of Los Angeles—ss.:

A. F. Mack, Jr., being duly sworn, says:

That he is one of the proctors of record herein for respondent, United States of America; that the time for filing and docketing the Record on Appeal herein with the United States Circuit Court of Appeals for the Ninth Circuit expires July 10, 1945, under the citation issued by this Court under date of May 31, 1945.

That affiant has been advised by Theodore Hocke, Chief Deputy Clerk of this Court, that the Clerk is unable to prepare and file the Record on Appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within the time [80] fixed by the citation because the Reporter's Transcript has not been completed as yet and will not be completed before July 10, 1945.

That it is necessary to obtain further time and in order that there may be ample time affiant requests an additional period of thirty-six (36) days to and including August 15, 1945.

A. F. MACK, JR.

Subscribed and sworn to before me this 5th day of July, 1945.

(Seal)

BERNA WADDELL

Notary Public in and for the County of Los Angeles,  
State of California

My Commission Expires February 4, 1949.

[Endorsed]: Filed Jul. 6, 1945. [81]



[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING OF CASE

Upon reading the Affidavit of A. F. Mack, Jr. herein and good cause appearing therefor,

Ordered that the time for the filing of the Record on Appeal and docketing of this case in the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of this Court be and it is hereby extended from the present expiration date of July 10, 1945, to and including August 15, 1945.

Dated: July 6, 1945.

BEN HARRISON  
Judge

[Endorsed]: Filed Jul. 6, 1945. [82]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 82 inclusive contain the Original Citation and full, true and correct copies of Libel in Personam; Answer of Respondent United States of America; Stipulation dated December 6, 1944; Order for Discontinuance against Respondent Keystone Shipping Company; Amendment to

Paragraph 9 of Libel in Personam; Notice of Motion for an Order Permitting Libelant to Amend Libel to Conform to the Proof; Opinion; Amendment to Paragraph 12 of Libel in Personam and Order Permitting such Amendment; Findings of Fact and Conclusions of Law; Decree; Notice of Motion for an Order Correcting Inadvertent Omission from the Decree and to Make Such Decree Conform to the Truth; Order Correcting Nunc Pro Tunc Inadvertent Omission from Decree to Make Such Decree Conform to the Truth; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Praeceptum for Transcript of Record and Apostles on Appeal; Stipulation re Inclusion of Matters in Transcript of Record and Apostles on Appeal; Stipulation and Order for Use of Original Reporter's Transcript and Exhibits on Appeal; Affidavit of A. F. Mack, Jr. and Order Extending Time for Filing Record on Appeal and Docketing of Case which, together with Original Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 10 day of Aug., 1945.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,  
Chief Deputy Clerk.

[Title of District Court and Cause.]

Before the Honorable Ben Harrison

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

January 30, 1945

Appearances:

For the Libelant: Lawler, Felix & Hall, by John M. Hall, Esq., Marcus Mattson, Esq., and Wallace L. Kaapcke, Esq., 800 Standard Oil Building, Los Angeles, California.

For the Respondent United States of America: Lillick, Geary, McHose & Adams, by A. F. Mack, Jr., Esq., 634 South Spring Street, Los Angeles, California, and Robert E. Wright, Esq., Assistant United States Attorney. [1\*]

Los Angeles, California, Tuesday, January 30, 1945.  
10:00 a. m.

The Court: I will take up this motion for admission.

Mr. Hall: I desire to move for admission to this court of Wallace L. Kaapcke of San Francisco whom I certify is a member of good standing in the bar of California, and a person of good moral character.

The Court: Motion will granted. You may be admitted upon taking the oath, which will be administered by the clerk.

(The oath of admission was administered by the clerk.)

The Court: Gentlemen, are there any more additional facts that can be stipulated to besides those that are set forth in the stipulation?

Mr. Mack: I don't believe there are, your Honor. Of course, the stipulation goes as to what the witnesses, if



called, would testify, and not as to the truth of the facts or the facts themselves.

Mr. Hall: Mr. Mack and I have investigated the situation pretty thoroughly and I think we have got about as far as we can in stipulation.

The Court: Very well. You may proceed.

Mr. Hall: I desire to file an amendment to the libel in personam, and order permitting the filing thereof. This is an amendment to paragraph 9 of the original libel, and there is a stipulation attached to this document that may be [2] filed and deemed denied in certain respects.

Paragraph 9 of the original libel was drawn upon the assumption that the entire quantity for which we were claiming damages came off the vessel. As has now been made plain by our printed memorandum, we are claiming damages not only for that quantity, but for a quantity in the shore tanks with which the cargo was mixed.

The Court: You gentlemen are not even able to stipulate as to what was the cause of the mixing?

Mr. Mack: That seems to be in some doubt, your Honor. We will put on all the testimony we have on the subject.

The Court: There is certainly something wrong some place along the line.

Mr. Mack: Yes, that is true.

The Court: It seems to me that the parties must have determined what was wrong when you could pump out of one tank and get a good product, and pump out of two tanks that became intermingled.

Mr. Mack: Well, we will put on what evidence we have, and Standard Oil will put on what evidence they have to show, I presume, that they are in the clear.



The Court: I didn't know but what maybe you gentlemen might be able to agree on that. You have been very frank and fair in your dealings and stipulations, and it seems to me that the parties should know what happened. The master of the vessel certainly should have been able to have [3] ascertained the difficulty. I didn't know but what maybe you might be able to agree as to just what happened and what was wrong. However, you may proceed.

Mr. Mack: Incidentally, I don't know whether the court has seen it or not, but we took the deposition of the master, and it was filed.

The Court: No. I have not seen any deposition.

Mr. Mack: It was filed last week in the clerk's office.

The Court: None of them have been called to my attention.

Mr. Mack: We will get that. It is the deposition of Captain Olsen.

Mr. Hall: Will the order be made permitting the amendment to which I referred?

The Court: Yes, take your order.

Mr. Hall: I would also like an order for discontinuance as against the respondent, Keystone Shipping Company. I believe that to be in order. Keystone Shipping Company has never been served with process and has never appeared. It was certainly the agent of the United States of America, and under the authorities I believe that would be proper to clear the record.

The Court: You may take your order. You may proceed.

Mr. Hall: Will you come forward, Mr. Kilbourn, please? [4]

## FRED R. KILBOURN,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Fred R. Kilbourn.

The Clerk: Will you spell your last name?

The Witness: K-i-l-b-o-u-r-n.

## Direct Examination

By Mr. Hall:

Q. What is your present occupation, Mr. Kilbourn?

A. I am plant superintendent of the Point Wells plant.

Q. Is that a plant owned and operated by Standard Oil Company of California? A. Yes.

Q. What department of that company operates the plant? A. The marketing department.

Q. How long have you been in the employ of the Standard Oil Company of California?

A. Since 1916.

Q. When did you go to Point Wells in their employ?

A. 1941.

Q. When did you become plant superintendent at Point Wells? A. I think in 1942.

Q. What are your duties in general at Point Wells as plant superintendent? [5]

A. I am directly responsible for the operations of the whole plant, that is, personnel and production and everything else.

Q. Is that what is known as a bulk terminal plant?

A. Yes.

(Testimony of Fred R. Kilbourn)

Q. You are in charge of the entire plant?

A. Yes.

Q. Was that true in April of 1943? A. It was.

Q. Is that a plant located on Puget Sound?

A. It is.

Q. How far from Seattle?

A. It is about fourteen miles north of Seattle.

Q. On the east shore of the Sound?

A. Yes, sir.

Mr. Hall: I ask that this plat be marked as Libelant's Exhibit 1 for identification.

The Court: Any objection to the admission?

Mr. Mack: No. If you want to put it in, Mr. Hall, I have no objection. You have shown it to me.

Mr. Hall: Very well.

The Court: It may be admitted as Libelant's Exhibit 1.

(The document referred to was marked as Libelant's Exhibit No. 1, and was received in evidence.)

Q. By Mr. Hall: I will show you, Mr. Kilbourn, the plat which has been marked as Libelant's Exhibit 1, and ask [6] you if that correctly shows the layout of the bulk plant at Point Wells as of April of 1943?

A. Will you repeat that again? Did you say the plant? Q. The layout of the plant.

A. This is the 1943 layout of the plant, yes, sir.

Q. Now, on this plat, there have been certain lines made in red. What do they represent?

A. They represent the gasoline lines, that is, cargo lines, from the dock to the tanks.

(Testimony of Fred R. Kilbourn)

Q. I notice that the red lines lead to tanks numbered 61 and 62. What were those tanks used for in April of 1943?

A. They were used for the storage of our standard gasoline.

Q. Now, will you understand that in subsequent questions that I ask you that I am asking for facts that existed in April of 1943? A. Yes.

Q. Were there any other tanks than 61 and 62 used for the storage of gasoline at that time?

A. No, not standard gasoline. Those were the only two tanks they had for storage of standard gasoline at that time.

Q. Now, I notice that the blue lines run to tanks which are numbered 8, 9, 40 and 41. What were those used for? [7] A. Diesel fuel oil.

Q. Were tanks 9 and 40 used for the reception of any diesel oil from the Steamship Egg Harbor?

A. No. Tanks 9 and 40 were not used for the reception of cargo from the Egg Harbor.

Q. Were there any lines or cross-over lines which connected the red lines shown on this chart with the blue lines shown on this chart so that fluid from a red line could get into a blue line or vice versa?

A. I will explain a little farther that our product lines from the dock to the tanks are all separate. That is, in all products in the gasoline and diesel oil products, they are all separate, with separate pumps.



(Testimony of Fred R. Kilbourn)

The Court: I understood from the stipulation that there was no dispute of the fact that there was comingling of the diesel and gasoline at the end of the hose leading from the tanker. Is that true?

Mr. Mack: No, if the court please. The stipulation was very specific. There was no stipulation as to how, when, or where any contamination occurred.

The Court: All right.

Q. By Mr. Mack: Well, then, there was no way that fluid in a red line could get into a blue line after it left the dock header. Is that correct?

A. Absolutely none.

Q. And no way in which a fluid in a blue line could [8] get into a red line after it left the dock header?

A. No way at all.

Q. I have used the term "dock header." Will you tell us what that is?

A. The dock header is a place connecting hoses from the boat to the dock pipeline.

Q. I notice on Libelant's Exhibit 1 the term "dock riser" is used. Is that the same as the dock header?

A. Yes.

Q. And it is kind of a hydraulic arrangement above the dock for the connection of the ship's hoses. Is that correct?

A. Yes.

Q. Are there separate headers or risers for gasoline as distinguished from diesel?

A. Yes.

Q. Are they painted different colors?

(Testimony of Fred R. Kilbourn)

A. Yes. Gasoline headers are painted red, and our diesel headers are painted green, and they also have the name of the products tagged on each header.

Q. Now, is there any arrangement on the header for the taking of samples as the fluid passes through the headers into the shore pipe?

A. Yes, there is on each header. On top of each header is a petcock with a short length of pipe probably one foot long curved to fill sample bottles as the product is pumped. [9]

Q. Was there any way in which fluid from any other line not colored either red or blue on this Libellant's Exhibit 1 might have gotten into a red or blue line?

A. No.

Q. There are no connecting lines?

A. None at all.

Q. Now, you recall that the vessel Egg Harbor arrived at Point Wells on April 23, 1943?

A. Yes.

Q. Were you in the plant that day?

A. I was.

Q. Do you recall about when the vessel tied up?

A. The vessel tied up around about 5:30, I believe, in the morning.

Q. There is a phrase on this chart reading "Ship discharged diesel fuel in tank 8 using this riser." Did the Egg Harbor tie up at the dock at the place indicated by the words "this riser"?

A. Yes, in our No. 2 berth, as we call it, on the south end of the outside portion of the dock.

(Testimony of Fred R. Kilbourn)

Q. How soon were the ship's hoses connected to the header at the dock?

A. Around 1:30 or 1:45, along there some place.

The Court: Were you present?

The Witness: I was when the hoses were connected up, yes, sir. [10]

Q. By Mr. Hall: Now, what products did this vessel carry?

A. It carried two products, Standard gasoline and Standard diesel fuel.

Q. Now, was the Standard gasoline a colorless fluid?

A. No. The Standard gasoline is a light amber color.

Q. What was the color of the diesel?

A. It was very dark brown.

Q. Now, were you on the dock when the hoses were run to the vessel?

A. Yes. I was on the dock when the hoses were put on the vessel.

Q. Did the Standard Oil people connect the hoses to the dock headers?

A. Yes. The dock men connected the hoses to the headers.

Q. Who made the connection between the hoses and the pipes on the vessel? A. The ship's crew.

Q. Were those hoses the property of Standard Oil Company of California? A. Yes.

The Court: What hoses are you referring to?

The Witness: The cargo hose, sir.

(Testimony of Fred R. Kilbourn)

The Court: The one that connects to the ship's hose?

The Witness: From the ship to the dock. [11]

The Court: I know, but who has the hose?

The Witness: I don't think this ship had any hose of its own. A lot of these ships don't carry hose. I don't know whether the Egg Harbor had their hose or not, but it is almost customary for the company to use its own hose. They are 50 foot long.

The Court: You don't know whether the Egg Harbor used theirs or yours?

The Witness: We used our own hose.

The Court: You used your own hose?

The Witness: Yes. There are only the two hoses from the boat to the dock.

Q. By Mr. Hall: There were two hoses?

A. Yes, sir.

Q. One went from a vessel connection to a header on the dock for the reception of gasoline, did it not?

A. Yes.

Q. And one went from a vessel connection to a header on the dock for the reception of diesel oil, did it not?

A. Yes, sir.

The Court: Just a moment. I understand the stipulation does cover, though, that the tests were made of the gasoline and diesel oil in the tanks, and they were found intact. Is that not true?

Mr. Mack: Excuse me, your Honor, I didn't quite catch that. [12]



(Testimony of Fred R. Kilbourn)

The Court: The gasoline and diesel oil in the tanks of the vessel were not commingled?

Mr. Mack: That is right. Samples were taken by the Standard Oil people at Point Wells. I believe probably it will come out in the testimony.

The Court: I thought that was a part of the stipulation.

Mr. Hall: It was a part of the stipulation, your Honor, that samples were taken from the vessel's tank at Point Wells, and that by a visual inspection the contents appeared to be all right. Now, I want to show by this witness how those samples were taken to explain the contamination which was later discovered.

The Court: All right.

Q. By Mr. Hall: You said each of these hoses was 50 feet long? A. Yes.

Q. Take the gasoline hose, was that a clean hose?

A. It was a brand new hose, never been used. It was an 8-inch hose.

Q. Was the diesel hose a clean hose? A. Yes.

Q. Did the ship's crew make attachments of those hoses so far as the vessel's pipes were concerned?

A. Yes, they did.

Q. Were any samples taken from them?

A. Well, the gauger took samples of tanks on board the [13] boat.

Q. What was his name? A. Lonsdale.

Q. Just how did he take the samples, by lowering the bottles?

(Testimony of Fred R. Kilbourn)

A. Yes. They have little containers that hold about a 16-ounce bottle. The bottle is lowered into the tank probably midway and then they take it out and look at it.

Q. Did those samples look all right?

A. Those samples were fine.

Q. Did they smell all right?

A. They smelled all right. There was no odor of diesel and vice versa.

Q. Then, did the vessel start to discharge the cargo?

A. Yes. They started pumping the Standard gasoline first.

Q. Did there come a time when they were discharging both products?

A. Yes. The diesel oil they started, oh, about an hour or three-quarters of an hour later.

The Court: First they started pumping gasoline?

The Witness: Yes, and then followed it up with diesel.

Q. By Mr. Hall: About what time did the discharge of gasoline from the vessel start?

A. The gasoline started around 1:45.

Q. The pumps that controlled this discharge were [14] located on the vessel, were they not? A. Yes, sir.

Q. Into what tank was the gasoline run when it was first discharged from the vessel?

A. It was pumped into tank 62.

Q. And into what tank was the diesel discharged when it was first discharged from the vessel?

A. That was discharged into tank 8.

(Testimony of Fred R. Kilbourn)

Q. Now, did tank 62 have any Standard gasoline in it before the product from the vessel was discharged into it? A. Yes, it did.

Q. How much?

A. Well, there was about 11,339 barrels of Standard gasoline.

Q. Did tank 8 have any diesel furnace oil in it before the diesel was discharged from the vessel into that tank?

A. Yes. There was 2,376 barrels in that tank.

The Court: Just a moment. Let me get that clear in my mind. How much gasoline was in tank 62 at the time you started to pump?

The Witness: There was 11,339 barrels.

The Court: That was the amount of gasoline in tank 62 when you started to pump it from the Egg Harbor?

The Witness: Yes.

The Court: How about the diesel? [15]

The Witness: Well, there was—

The Court: That is what tank?

The Witness: Tank No. 8. There was 2,376 barrels in that.

Q. By Mr. Hall: Now, was the 11,339 barrels of Standard gasoline in tank 62 good, uncontaminated, merchantable stock? A. Yes.

Q. Was the 2,376 barrels of diesel in tank 8 good, merchantable, uncontaminated stock? A. It was.

Q. Now, as this discharging of the Standard gasoline and the diesel progressed, were samples of those products taken at the bleeders on the dock header?

(Testimony of Fred R. Kilbourn)

A. Yes. The gauger started in taking samples of the bleeders on the headers when the boat started to pump. As soon as it started to pump, they took samples.

Q. That was true of both gasoline and diesel?

A. Yes.

Q. How often did the gauger take samples?

A. On this boat, every hour.

Q. Was it the duty of that gauger to report anything unusual to you that might be observed with respect to those samples? A. Yes, it was.

Q. Now, did there come a time during the afternoon [16] when the gauger told you that he observed something unusual about the samples?

A. Yes. Around 4:15 or 4:30, he called my attention. I happened to be out on the dock near the dock office and he called me down there and said that the gasoline was badly off color. He said it was very brown and dark. He said, "There is something wrong here."

Q. Was that in a sample he had just taken?

A. Yes. Just around 4:20 he had taken a sample.

Q. Did he call to you from where he was?

A. Yes. He called from the headers. He was quite excited that there was off color in the gas tank.

Q. Did he show you a sample?

A. He did. There was a 4-ounce sample bottle he had in his hand, and he showed it to me.

Q. Was it dark in color? A. Yes, very dark.

Q. Was that sample taken from bleeders on the gasoline headers? A. Yes.

A. Yes. I took another one right away to see how it looked. It was the same color.



(Testimony of Fred R. Kilbourn)

Q. Did you, yourself, take a sample at that time?

Q. What did you do then?

A. Well, I called out to the pump men to stop pumping immediately. [17]

Q. Did the pumping stop immediately?

A. Yes, on all products.

Q. Did you go on board the vessel? A. I did.

Q. Did you make inquiry of any one of the vessels or inquire for any one on the vessel?

A. Yes. I asked for the pump man and the mate.

Q. Now, do you remember telephoning for any representatives of the company of the vessel's operators to come out and see what the trouble was?

A. Yes. We called up Mr. Hicks and Mr. Stevens from Seattle to come out.

Q. Had they been in the plant earlier in the day?

A. Yes, they were out earlier in the day.

Q. Well, now, before Mr. Stevens and Mr. Hicks came out to the plant, did you go on the vessel with Mr. Simonsen? A. Yes.

Q. Who is he? A. Marine superintendent.

Q. Did you go with him on the vessel? A. Yes.

Q. Did you make inquiry for the captain?

A. We did.

Q. Was he there? A. He was not there.

Q. Did you make inquiry for the first mate? [18]

A. We did.

Q. And the first mate was not on board?

A. No.

Q. What mate was on duty?

A. The second mate.

(Testimony of Fred R. Kilbourn)

Q. Did you talk to him?           A. We did.

Q. Now, did you inquire for the pump man?

A. Yes, we did.

Q. Was the pump man on duty?

A. He was not.

Q. Well, what pump man was on duty?

A. Some relief pump man was on duty at the time.

The Court: When you first started to pump, would there be a test made at the time of the beginning of the pumping?

The Witness: That is customary, sir.

The Court: As I understand it, you first started to pump the gasoline?

The Witness: Yes.

The Court: About 1:45?

The Witness: Yes.

The Court: And then about an hour later they started to pump diesel oil?

The Witness: It wasn't quite an hour later. It was about a half hour later that they started pumping diesel oil.

The Court: Then, there was no test made between 1:45 [19] and 2:45?

The Witness: There was no test made on the gasoline. There was a test made on gasoline when we first started to pump the diesel oil. We made one, and then we doubled the both of them up. It is customary for the gauger—he stays in the yard as a general rule. The gauger takes samples every hour.

Q. By Mr. Hall: Was a sample taken of gasoline every hour until this discolored sample was obtained?

A. Yes.

(Testimony of Fred R. Kilbourn)

The Court: Then, as I understand, it would be probably about 3:45 before they found that the gasoline was off color?

The Witness: No, I would say around 4:00 or a little after 4:00. Maybe it was 4:20. It was around 4:00 or 4:20.

The Court: Then the first two tests would probably show O.K.?

The Witness: Yes. There were three tests which showed pretty good on the gasoline. It was fine as far as we could tell.

Q. By Mr. Hall: Now, did Mr. Stevens and Mr. Hicks come out to the plant? A. Yes.

Q. Did they see you when they came out to the plant?

A. Yes.

Q. Did they go on board the vessel?

A. Yes, they did. [20]

Q. And did they later tell you that they thought pumping might be resumed? A. They did.

Q. What did they say about it?

A. Well, they came up on deck and said they thought that disposed of this matter and we could start in pumping again.

Q. Then, you did resume pumping?

A. We did, yes.

Q. Did you take samples then as soon as the pumping started?

A. I took samples myself then. I stood right at the header and took samples of the gasoline as it was pumped off.

Q. One after the other?

A. Yes, one after the other.

(Testimony of Fred R. Kilbourn)

Q. Did the color of the gasoline clear up?

A. No.

Q. How long did that pumping go on?

A. I imagine 15 minutes.

Q. Was the pumping stopped then?

A. Yes, it was stopped.

Q. Well, now, what next occurred with respect to the pumping of the cargo?

A. Well, we talked it over and mutual agreement was made to shut off all the valves in the boat and just pump one product. [21]

Q. You mean somebody made that suggestion and the others thought that would be a good plan. Is that what you mean by "mutual agreement"? A. Yes.

Q. To pump one product at a time? A. Yes.

Q. Well, then, did they pump one product at a time?

A. Yes. They started pumping diesel oil.

Q. Have you the deck log? A. Yes.

Q. I notice in the deck log of the vessel, Mr. Kilbourn, it is stated that at 9:30 they began discharging diesel oil. Does that conform to your recollection as to when they started to discharge diesel oil alone?

A. It is the approximate time, I think.

Q. Now, when that discharge of the diesel oil was resumed, did you continue to run it into tank 8?

A. Yes.

Q. For how long did you continue to run that diesel oil into tank 8?

A. Until about 6:00 o'clock in the morning.

Q. To what depth in tank 8? A. About 18 feet.



(Testimony of Fred R. Kilbourn)

Q. And then was the flow of diesel oil diverted into some other tank? A. Into tank 41. [22]

The Court: Just a moment. Do I understand, then, in the diesel oil tank, that after you started the pumping of diesel oil it came out in good order?

The Witness: So far as we could tell it was in good order. We had no laboratory. We just used the smell and sight test.

The Court: But it appeared to be in good order?

The Witness: Yes.

The Court: And you continued to dump that into tank 8 where a mixed product had theretofore been dumped?

The Witness: Into tank 8, yes.

The Court: In other words, as I understand it, tank 8 had a certain amount of diesel oil before you started to pump?

The Witness: Yes.

The Court: And after you started to pump and you found a contaminated product flowing into tank 8, into the tank line that led to tank 8—

The Witness: We didn't find the contaminated product until we got all through pumping diesel oil.

Mr. Hall: I will clear it up, your Honor, perhaps.

Q. By Mr. Hall: Was there any way of telling whether the diesel oil was contaminated except by smelling it at that time? A. At that time, there was not.

Q. The only other method would have been a laboratory analysis, would it not, which would have taken time? [23] A. Yes.

(Testimony of Fred R. Kilbourn)

Q. Did you until sometime in the morning of the following day, that is, April 24, did you at any time before that believe that the diesel oil was contaminated?

A. No.

Mr. Hall: Does that answer the point, your Honor?

The Court: Yes.

Q. By Mr. Hall: Now, going back to the evening of the first day, that is, April 23, were the samples taken from the vessel's tanks on the evening of that day?

A. They were.

Q. Do you recall what tanks they took the samples from? By the way, was it this gauger of yours that went over and took the samples?

A. Another gauger went on, a party by the name of Knudson.

Q. Were you with him?

A. I was on the deck of the boat. I didn't go to each tank, but I saw him taking samples.

Q. Do you know how deep he put his bottle into the tanks on that occasion?

A. Oh, I would judge around 12 feet, 12 or 13 feet in the center of the tanks.

Q. Now, that evening, did you take any samples from tank 62 containing the Standard gasoline?

A. We did. [24]

Q. Did you send those samples anywhere the following day?

A. Yes. We sent them the first thing Friday morning or the next morning, to Laucks Laboratories in Seattle.

(Testimony of Fred R. Kilbourn)

Q. Did you send samples for any other tank with those samples from the vessel's tank and the samples from tank 62?

A. Yes. We sent a sample from tank 8.

The Court: That is your own tank?

The Witness: Yes, sir.

The Court: He asked you whether there were any from tanks of the vessel.

Mr. Hall: Well, I think he just testified he sent in the samples from the vessel's tank, from No. 62 and from boat tank 8. Is that right?

The Witness: Yes.

Q. By Mr. Hall: Now, did Lauks Laboratories report to your office by telephone the results of their analyses of these samples?

A. Yes. As soon as they worked through the analysis, they telephoned out to us the results of the test.

Q. Did they subsequently confirm that report by a written report? A. They did.

Mr. Hall: I ask that these sheets be marked as Libelant's Exhibits next in order.

The Court: Any objection? [25]

Mr. Mack: No, no objection. Of course, technically speaking I suppose they are hearsay, but these people are here from Laucks Laboratories and I suppose would back up their reports. So, I won't make any objection.

The Court: They may be admitted.

(The documents referred to were marked as Libelant's Exhibit Nos. 2, 3, 4 and 5, and were received in evidence.)

## [LIBELANT'S EXHIBIT NO. 2]

## CERTIFICATE

Bonded and Authorized  
By  
New York Produce Exchange  
American Bureau of Shipping  
U. S. Treasury Department  
Limited Referee Chemist  
American Oil Chemists Society

Laboratories :  
Seattle, Wash.  
Vancouver, B. C.

Representatives :  
Tacoma, Wash.  
Portland, Ore.  
Astoria, Ore.  
Spokane, Wash.  
Aberdeen, Wash.

Members Of :  
American Wood Preservers Ass'n  
American Council Of Commercial  
Laboratories  
Pacific N. W. Section Of The American  
Ass'n Of Cereal Chemists  
Assoc. Of Consulting Chemists  
And Chemical Engineers, Inc.  
American Society For Testing Materials  
Am. Inst. Mining & Metallurgical Engrs.  
Amer. Institute Of Chemical Engineers  
American Institute Of Chemists  
American Chemical Society  
National Safety Council

Cable Address "Laux"  
Established 1908

## LAUCKS LABORATORIES, INC.

Analytical and Consulting

Chemists • Assayers

Spectrographers

Metallurgists

Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 28, 1943

Report No. 82715

Standard Oil Company of California  
Point Wells, Washington



(Libelant's Exhibit No. 2)

Gentlemen:

We hereby certify that we have tested samples of  
DIESEL OIL  
submitted to us by you, and we have to report as follows:

Marked	Flash Point (Pensky-Martin)
A—5-P .....	178° F.
B—5-C .....	178° F.
C—5-S .....	178° F.
D—6-P .....	174° F.
E—6-C .....	175° F.
F—7-P .....	177° F.
G—7-C .....	175° F.
H—7-S (composite of 2 qt. cans) ..	174° F.

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:ch

This report is submitted for the exclusive use of the person, partnership, or corporation to whom it is addressed, and neither the report nor the name of these laboratories nor of any members of its staff, may be used in connection with the advertising or sale of any product or process without written authorization. This company accepts no responsibility except for the due performance of inspection and/or analysis in good faith and according to the rules of the trade and of science.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs.  
U. S. A. Lib. Exhibit No. 2, Filed Jan. 30, 1945. Ed-  
mund L. Smith, Clerk; by M. E. W., Deputy Clerk.

## [LIBELANT'S EXHIBIT NO. 3]

## CERTIFICATE

Bonded and Authorized  
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 New York Produce Exchange  
 American Bureau of Shipping  
 U. S. Treasury Department  
 Limited Referee Chemist  
 American Oil Chemists Society

Laboratories :  
 Seattle, Wash.  
 Vancouver, B. C.

Representatives :  
 Tacoma, Wash.  
 Portland, Ore.  
 Astoria, Ore.  
 Spokane, Wash.  
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Members Of :  
 American Wood Preservers Ass'n  
 American Council Of Commercial  
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 And Chemical Engineers, Inc.  
 American Society For Testing Materials  
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911 Western Ave.      Seattle

April 28, 1943

Report No. 82716

Standard Oil Company of California  
 Point Wells, Washington

Gentlemen:

We hereby certify that we have tested the sample of  
**GASOLINE**  
 submitted to us by you, and we have to report as follows:

(Libelant's Exhibit No. 3)

Marked: 3-C

## Distillation:

Boiling Point .....	104° F.
5 cc off at.....	134° F.
10 cc off at.....	150° F.
20 cc off at.....	174° F.
30 cc off at.....	196° F.
40 cc off at.....	218° F.
50 cc off at.....	238° F.
60 cc off at.....	257° F.
70 cc off at.....	274° F.
80 cc off at.....	290° F.
90 cc off at.....	315° F.
95 cc off at .....	336° F.
End Point .....	358° F.
Recovered .....	98.5%
Residue .....	1.0%
Loss .....	0.5%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:ch

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 3. Filed Jan. 30, 1945. Edmund L. Smith, Clerk: by M. E. W., Deputy Clerk.

## [LIBELANT'S EXHIBIT NO. 4]

## CERTIFICATE

Bonded and Authorized  
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New York Produce Exchange  
American Bureau of Shipping  
U. S. Treasury Department  
Limited Referee Chemist  
American Oil Chemists Society

Laboratories :  
Seattle, Wash.  
Vancouver, B. C.

Representatives :  
Tacoma, Wash.  
Portland, Ore.  
Astoria, Ore.  
Spokane, Wash.  
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Members Of :  
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## LAUCKS LABORATORIES, INC.

Analytical and Consulting  
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Metallurgists  
Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 26, 1943

Report No. 82684-A

Standard Oil Company of California  
Point Wells, Washington

Gentlemen:

We hereby certify that we have tested the sample of  
DIESEL FUEL OIL

submitted to us by you, and we have to report as follows:

Marked: Diesel Fuel Oil Tank 8

Flash Point (Closed Cup).....Flashes at room temperature  
(70° F.)

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm



(Libelant's Exhibit No. 4)

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 4. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 5]

CERTIFICATE

Bonded and Authorized  
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New York Produce Exchange  
American Bureau of Shipping  
U. S. Treasury Department  
Limited Referee Chemist  
American Oil Chemists Society

Laboratories:  
Seattle, Wash.  
Vancouver, B. C.

Representatives:  
Tacoma, Wash.  
Portland, Ore.  
Astoria, Ore.  
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Members Of:  
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Ass'n Of Cereal Chemists  
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And Chemical Engineers, Inc.  
American Society For Testing Materials  
Am. Inst. Mining & Metallurgical Engrs.  
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LAUCKS LABORATORIES, INC.

Analytical and Consulting

Chemists • Assayers

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Metallurgists

Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 26, 1943

Report No. 82684-B

Standard Oil Company of California  
Point Wells, Washington

(Libelant's Exhibit No. 5)

Gentlemen:

We hereby certify that we have tested the sample of

## GASOLINE

submitted to us by you, and we have to report as follows:

Marked: Std. Gas Tank 62

## Distillation:

Boiling Point .....	102° F.
5 cc off at.....	136° F.
10 cc off at.....	151° F.
20 cc off at.....	180° F.
30 cc off at.....	208° F.
40 cc off at.....	234° F.
50 cc off at.....	256° F.
60 cc off at.....	278° F.
70 cc off at.....	299° F.
80 cc off at.....	330° F.
87 cc off at.....	374° F.
88 cc off at.....	392° F.
89 cc off at.....	410° F.
89 cc off at.....	428° F.
90 cc off at.....	460° F.
92 cc off at.....	510° F.
% off at 122° F.....	2.0
% off at 140° F.....	7.0
% off at 158° F.....	12.0
% off at 176° F.....	19.0
% off at 194° F.....	25.0
% off at 212° F.....	31.5
% off at 230° F.....	39.5
% off at 248° F.....	46.0
% off at 266° F.....	55.0

## (Libelant's Exhibit No. 5)

% off at 284° F.....	64.0
% off at 302° F.....	72.0
% off at 320° F.....	77.5

Standard Oil Co. of Calif.    -2-    Report No. 82684-B

% off at 338° F.....	81.5
% off at 356° F.....	84.0

Recovered .....	92.0%
Residue .....	7.0%
Loss .....	1.0%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 5. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Q. By Mr. Hall: I show you documents which have now been marked Libelant's Exhibits 2, 3, 4, and 5, and ask you if those are the reports which came to you from Laucks Laboratories with respect to these samples taken from the vessel's tanks, the sample taken from tank 62, and the sample taken from shore tank 8.

A. That is correct.

(Testimony of Fred R. Kilbourn)

Q. Now, with reference to the document which is marked Libelant's Exhibit 2, where was the oil taken from which is referred to in that report?

A. It was taken from the ship's tanks, 5 port, 5 center and 5 starboard tank, 6 port and 6 center, 7 port, 7 center and 7 starboard tanks of diesel.

Q. Does that report show a merchantable or an unmerchantable product?

A. It shows a merchantable product.

Q. Now, I show you the document which is marked Libelant's Exhibit 3, and ask you where the fluid was taken [26] from which is the subject of that report?

A. That was taken from the gasoline tanks of the boat. That is 2, 3 and 4.

Q. Is that in other words a combination sample from the gasoline tanks 2, 3 and 4?

A. Yes. We call it a composite sample. They are all poured together and taken in one test.

Q. Can you tell us why you didn't have a separate report with respect to separate samples from the vessel's tanks 2, 3 and 4.

A. To speed up the tests was the main reason.

Q. Now, where was the fluid taken from which is the subject of the report which is marked Libelant's Exhibit 4?

A. That was drawn from tank No. 8, diesel fuel tank.

Q. First, let me ask you, does the report which is marked Libelant's Exhibit 3 show a merchantable or unmerchantable product?

A. That is a merchantable product.



(Testimony of Fred R. Kilbourn)

Q. Does the report which is marked Libelant's Exhibit 4 show a merchandable or unmerchutable product?

A. Unmerchutable.

The Court: What type does that refer to?

Q. By Mr. Hall: Where was the fluid taken from that is illustrated in Libelant's Exhibit 4?

A. From tank 8.

Q. This is diesel? [27] A. Diesel fuel.

Mr. Mack: That was the shore tank?

The Witness: Yes.

Q. By Mr. Hall: Where was the fluid taken from which is the subject of the report which is marked Libelant's Exhibit 5? A. From tank 62.

Q. Does that show a merchantable or unmerchutable product? A. Unmerchutable product.

Q. And by "unmerchutable" you mean a contaminated product? A. Yes.

Q. Now, were these telephone messages you got from Laucks Laboratories on the morning of April 24 the same in substance as these written reports later shown you?

A. Yes, they were.

Q. Now, was the receipt of that telephone advice from Laucks Laboratories the first intimation or first knowledge you had had that the diesel shore tank 8 was contaminated? A. It was.

Q. I think you said already that none of the samples of diesel taken at the dock headers had indicated by smell any contamination with gasoline. Is that correct?

A. That is right.

Q. Now, the log of the vessel states that on April [28] 24, 1943, they finished discharging all diesel oil at

(Testimony of Fred R. Kilbourn)

6:10 in the evening. Does that conform to your recollection?      A. It does.

Q. Did they then start to pump the gasoline out of the vessel?

A. They did. Not right away, it was a couple of hours which elapsed before they started the gasoline.

Q. Now, when they started to run the gasoline out of the vessel, did they first run it into shore tank 62?

A. They started to pump again to shore tank 62.

Q. Now, will you tell us what procedure they followed in running that gasoline out of the vessel in seeing that each tank was clear before they changed to another shore tank?

A. When they started to pump the gasoline by itself, it was still off color, so they decided to try each tank and see how long before it cleared up, and they started to pump the bottoms off each tank until they were cleared. Tank 2 on the vessel was a little longer clearing up. It took about a half hour, showing there was diesel oil on the bottom of the tank.

Q. These tanks in the vessel are run crosswise of the vessel, are they not?      A. Yes.

Q. And there is a port, a starboard and a center tank on each of those crosswise sections. Is that correct? [29]

A. Yes.

Q. Now, the gasoline on the vessel was in tanks 2, 3 and 4?      A. 2, 3, 4 and 9.

Q. However, up to the time we are talking about now, there hadn't been anything discharged out of tank 9?

(Testimony of Fred R. Kilbourn)

A. That is right.

Q. Now, then, in running out the gasoline separately, did they run it first out of tank 4?

A. It was out of tank 4.

Q. Were samples taken at the dock headers frequently as that was run? A. Yes.

Q. Now, did the samples taken at the dock headers clear up so that a point was reached where the gasoline coming out of tank 4 was clear? A. Yes.

Q. Did they switch and take the gasoline out of some other tank? A. Yes. They started tank 3.

Q. Did they do the same thing there? A. Yes.

Q. Pumped out of that until the gasoline showed clear? A. That is right.

Q. Did they then go to another tank?

A. They went to tank 2. [30]

Q. Did they pump that until the gasoline showed clear? A. They did.

Q. Now, your information as to what tanks they were pumping from, of course, came from information people on the vessel gave you, did it?

A. Yes, that is right.

Q. While they were clearing these three tanks, was the gasoline being run into shore tank 62?

A. It was.

Q. All right. Now, when the product in each of those tanks was running clear, was there a shift made to another shore tank?

(Testimony of Fred R. Kilbourn)

A. Yes. As soon as it cleared up, we shifted over to tank 61. Tank 62 was then closed.

Q. The suction lines that take the fluid out of the ship's tank are on the bottom of the tank, are they not?

A. That is correct.

Q. Now, the log of the vessel shows that on April 25, 1943, they finished discharging all gasoline at 5:10 in the morning. Is that about your recollection?

A. That is right.

Q. Now, after the entire cargo was discharged from the vessel, were any further samples taken from shore tanks 41 and 61?

A. Yes; we took samples from tanks 41 and 61.

Q. Did you take another sample out of tank 8? [31]

A. We did.

Q. Were those samples sent to Laucks Laboratories for testing? A. They were.

Q. Did you subsequently receive reports from Laucks Laboratories as to those tests? A. We did.

Mr. Hall: I ask that these sheets be marked as Libellant's Exhibits next in order.

The Court: Any objection?

Mr. Mack: No objection.

The Court: They may be admitted.

(The documents referred to were marked as Libellant's Exhibits Nos. 6 and 7, and were received in evidence.)



[LIBELANT'S EXHIBIT NO. 6]

CERTIFICATE

Bonded and Authorized  
By  
New York Produce Exchange  
American Bureau of Shipping  
U. S. Treasury Department  
Limited Referee Chemist  
American Oil Chemists Society

Laboratories :  
Seattle, Wash.  
Vancouver, B. C.

Representatives :  
Tacoma, Wash.  
Portland, Ore.  
Astoria, Ore.  
Spokane, Wash.  
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American Wood Preservers Ass'n  
American Council Of Commercial  
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Ass'n Of Cereal Chemists  
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American Society For Testing Materials  
Am. Inst. Mining & Metallurgical Engrs.  
Amer. Institute Of Chemical Engineers  
American Institute Of Chemists  
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National Safety Council

Cable Address "Laux"  
Established 1908

LAUCKS LABORATORIES, INC.

Analytical and Consulting  
Chemists • Assayers  
Spectrographers  
Metallurgists  
Engineers  
Samplers • Inspectors  
911 Western Ave. Seattle  
April 26, 1943

Report No. 82686

Standard Oil Company of California  
Point Wells, Washington

(Libelant's Exhibit No. 6)

Gentlemen:

We hereby certify that we have tested the sample of  
DIESEL FURNACE OIL  
submitted to us by you, and we have to report as follows:

Marked: A—Diesel Furnace Oil Tank #41

B—Diesel Furnace Oil Tank #8

A

B

Flash Point ( Pensky-Martin ) ..160° F.    Flashes at room  
temperature  
(73° F.

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs.  
U. S. A. Lib. Exhibit No. 6. Filed Jan. 30, 1945. Ed-  
mund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 7]

CERTIFICATE

Bonded and Authorized  
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New York Produce Exchange  
American Bureau of Shipping  
U. S. Treasury Department  
Limited Referee Chemist  
American Oil Chemists Society

Laboratories :  
Seattle, Wash.  
Vancouver, B. C.

Representatives :  
Tacoma, Wash.  
Portland, Ore.  
Astoria, Ore.  
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LAUCKS LABORATORIES, INC.

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Metallurgists

Engineers

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911 Western Ave. Seattle

April 30, 1943

Report No. 82760-A

Standard Oil Company of California

Point Wells, Washington

Gentlemen:

We hereby certify that we have tested the sample of  
GASOLINE

submitted to us by you, and we have to report as follows:

Marked: 4/26/43, Std. Gas Egg Harbor

Tank #61

Distillation:

Boiling Point ..... 105° F.

5 cc off at..... 132° F.

(Libelant's Exhibit No. 7)

10 cc off at.....	150° F.
20 cc off at.....	180° F.
30 cc off at.....	208° F.
40 cc off at.....	228° F.
50 cc off at.....	245° F.
60 cc off at.....	261° F.
70 cc off at.....	277° F.
80 cc off at.....	295° F.
90 cc off at.....	319° F.
95 cc off at.....	347° F.
End Point .....	370° F.
% off at 122° F.....	3.0
% off at 167° F.....	15.5
% off at 212° F.....	31.5
% off at 257° F.....	57.5
% off at 302° F.....	83.0
% off at 347° F.....	95.0
Recovered .....	97.5%
Residue .....	1.5%
Loss .....	1.0%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:mh

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 7. Filed Jan. 30, 1945, Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.



(Testimony of Fred R. Kilbourn)

Q. By Mr. Hall: I show you a document which has been marked Libelant's Exhibit 6 and ask you where the fluid came from which is the subject of that report.

A. Diesel tank 41 and diesel tank 8.

Q. What does that report show with respect to the diesel from tank 41? Was it a merchantable or unmerchantable product?

A. 41 was a merchantable product.

Q. With respect to the diesel from shore tank 8, what was that? A. Unmerchantable.

Q. And by unmerchantable, you mean contaminated?  
[32] A. Yes.

Q. Where was the fluid there taken from that is the subject of the report which is marked Libelant's Exhibit 7? A. That was taken from tank 61.

Q. Does that show a merchantable or unmerchantable product? A. A merchantable product.

Q. In April of 1943 were there any facilities at Point Wells for reprocessing contaminated petroleum products?

A. None whatever.

The Court: Haven't you gentlemen stipulated as to the means of arriving at damages, if any? In other words, the necessity of bringing the product back to El Segundo for reconditioning?

Mr. Hall: We have stipulated that witnesses would testify, yes, your Honor, as to the damages, based upon the theory that we are entitled to damages not only for what came out of the vessel, but for that residue in the tanks which was contaminated.

The Court: I understand that. I was wondering if it was going to be necessary to bring in evidence to the effect that it was necessary to bring this contaminated oil back

(Testimony of Fred R. Kilbourn)

to El Segundo for refinement, on whether it had a marketable value in that condition at *Fort Wells*, or whether there were other facilities for such refinement.

Mr. Mack: I think he has covered it already, your [33] Honor. I am sure the situation is that they had no facilities up there whatever for refining.

The Court: Then the contaminated products would not have a marketable value. I think that should be established, in other words, whether the contaminated product had a marketable value at Point Wells.

Mr. Mack: Perhaps Mr. Kilbourn can establish that.

The Court: Would those contaminated products have any marketable value in their commingled condition?

The Witness: No, sir. They would have none at all.

The Court: Can you tell me how many barrels of merchantable product was removed from the vessel?

The Witness: I can't without the records.

Mr. Hall: May I have the court's question and the answer read?

(The record was read.)

The Court: The thought I have in mind, counsel, is that there is perhaps going to be some argument between you as to whether or not you are entitled to recover for the portion in the tanks contaminated, and I would like to bring out the segregations in order that the facts may be clear, so that when this case eventually goes to the Circuit Court, they will be able to finally settle it without sending it back for a retrial on some issues.

Mr. Hall: Yes, sir. I will see that you are furnished with those figures. The amendment to the libel that I put in [34] this morning of course gives a part of those.

(Testimony of Fred R. Kilbourn)

That, plus the stipulation which I will later read, I believe, will complete the set of figures.

Q. By Mr. Hall: When you saw that discolored sample that was taken about 4:30 in the afternoon of the first day, did you come to the conclusion at once that diesel had gotten into the gasoline? A. We did.

Q. And that was indicated by the color and the smell, was it?

A. The color and the smell both. There was a very decided smell of diesel oil.

The Court: The gasoline got into the diesel, too, didn't it?

The Witness: It did, yes.

Mr. Hall: That is all.

#### Cross-Examination

By Mr. Mack:

Q. Mr. Kilbourn, referring again now to Libellant's Exhibit 1 for a minute. Referring to the layout up there at Point Wells, is my understanding correct that from the time diesel or gasoline from the vessel started into your risers, from that time on, you had sole charge and control of the respective products?

A. We had from the shore tank, from the dock on, yes.

Q. That was what I meant. [35] A. Yes.

Q. Now, as I understand it, you furnished the gasoline hose and the diesel hose that attached to the lines on the vessel? A. We did, that is right.

Q. And then the two discharging hoses, as they are sometimes called, attached to the lines on the vessel which were 50 feet long. Is that right? A. Yes.



(Testimony of Fred R. Kilbourn)

Q. Which were attached to the risers on the dock?

A. That is right.

Q. Then the risers on the dock carried the respective products wherever you routed them. Is that right?

A. They followed the pipe line through the tank, and the routing in the tanks was done in the valves of the respective tanks.

The Court: But you routed the gasoline at these risers, I believe you call them?

The Witness: Yes, risers.

The Court: And then you, from that time on, routed to the various tanks?

The Witness: That is right, yes.

Q. By Mr. Mack: Putting it another way, Mr. Kilbourn, from the minute the gasoline and the diesel went into the discharging hose, the ship, from that time on, had nothing whatever to do with where those products went, did it? [36]

A. No, that is right.

Q. Now, at any time during the discharging operation, did you tell the ship or any of its crew or operators where you were putting these respective products?

A. No.

Q. In other words, to use a familiar phrase of the street, it was strictly your own business where you put them. Isn't that right?

A. Yes.

Q. Now, is there any kind of a device or contraption at the Point Wells plant called a "manifold"?

A. There is, yes.

Q. Where would that be?

A. In the pump house.

Q. Where is the pump house?

A. It is located right here between the boiler room and tank three and four.



(Testimony of Fred R. Kilbourn)

Q. It is right on the map where the words "block valve" in red ink appear, right in that vicinity?

A. Yes.

Q. In moving the products from the ship after they came into your lines, around in your yard there, was a pump necessary? A. No, no pump was necessary.

Q. What carried the products to their ultimate destination in your storage facilities? [37]

A. The pump from the ship.

Q. Now, with respect to the gasoline, I understand the gasoline lines are marked in red on this Exhibit No. 1? A. Yes.

Q. And with respect to the particuuar discharging operations of the Egg Harbor in April of 1943, which dock riser was used for the gasoline?

A. The dock riser right adjacent to the diesel oil, probably, oh, eight or ten feet apart.

Q. Let me draw a line out from that in pencil and mark that "G." That is the dock riser that you used for the gasoline on that occasion? Is that right?

A. Yes.

Q. Now, would you just show me there where the gasoline would come, what course it would follow?

A. The gasoline would travel along here, along this line here, out here, around the dock here, and this tank, this valve being open.

Q. You have just drawn the course on the Exhibit 1 from the dock riser "G" along to the left side of the paper to the first red line, and along that red line to the point marked "valve" and then to the right and up to tank 62? A. Yes.

(Testimony of Fred R. Kilbourn)

Q. This first joint here, Mr. Kilbourn, from "G" to the left of the diagram where the one red line goes up to the top of the page, are there any valves or anything to force the [38] gasoline up that line?

A. No valves, no.

Q. Is that blocked off somehow?

A. It has a tee.

Q. All right. Now, when we get up to the line running toward the top of the paper to where there is a notation marked "valve," what are those things called valves there?

A. There is a valve on the 16-inch line, and on the 10-inch line. They are merely control valves when pumping is done from the shore tanks.

Q. Is one of those valves necessary to prevent backing up over to the left here?

A. That is right, yes. That can be used for that. This valve is very seldom used, if ever. It is just in case of an emergency or when something breaks where you shut that valve off.

May I explain the routine of pumping?

Q. Yes.

A. This part here is shut off and we are pumping out to the dock.

Mr. Hall: Pardon me, counsel. The witness, in his last answer, referred to the red lines running on the chart to the left of what is called the lunch room and the office.

The Court: I think we will take a 5-minute recess.

(Short recess.)

The Court: Proceed, gentlemen. [39]

Mr. Mack: May I have the last question and answer read?

(Testimony of Fred R. Kilbourn)

(The record was read.)

Q. By Mr. Mack: Mr. Kilbourn, two facilities there at Point Wells, or tanks 61 and 62, as I understand it, are the only tanks used for storage of gasoline?

A. Of Standard gasoline.

Q. Of Standard gasoline? A. Yes.

Q. Incidentally, what was the capacity of those tanks, or what is the capacity?

A. They are around about 135,000 barrels each.

Q. Now, to get back to the diagram again, perhaps it would be clearer if I just took a pencil and traced lightly in the general vicinity of the pipe line that carried the gasoline.

The Court: It is clear, counsel.

Mr. Mack: All right, if it is clear, your Honor.

The Court: He has made it clear. The only things I am interested in are these other red lines that are supposed to carry gasoline. In other words, as I understand it, there is a valve here, and over here to the pump house, and as I understand it, they use the pump house when they are loading oil.

The Witness: Yes.

The Court: Now, this other red line that shows on the left of the page towards the pump house?

The Witness: That leads to another one on the dock. [40] There are two lines. This is a 10-inch line. This is a 16-inch line. This is the one we tried to pump into because there is less pressure. The larger line will take more gasoline. You can pump it through this header, through there, and go around just as well, but it is a smaller line in here and naturally retards the ship's pumping.

(Testimony of Fred R. Kilbourn)

Q. By Mr. Mack: Is my understanding correct, Mr. Kilbourn, that in this particular operation the pump house on shore was not involved in any way?

A. It was not involved in any way except that the gasoline—it was not used in pumping. This line is open here. These valves are all shut on the dock here. Both of these lines are open all the time.

Q. Well, we will mark one "V" and the other one "V-1."

Then, as I understand you, Mr. Kilbourn, so far as the gasoline was concerned only, it went in the course indicated from dock riser "G" along to the first joint, then up to the center of the page and around to the right and into tank 62? A. Yes.

Q. Now, you mentioned that in tank 62, before any discharge from the Egg Harbor was commenced, there were 11,339 barrels of Standard gasoline. Is that right?

A. Yes.

Q. How was that figured?

A. Well, do you mean how they arrived at that?

Q. Yes. [41]

A. We gauge those tanks prior to the ship's pumping.

Q. In other words, are the tanks calibrated so that according to a certain depth there are so many barrels in the tanks?

A. The tanks themselves are not calibrated. There is a sheet that shows the number of barrels there are per inch or foot or whatever you have. The measuring is done by an automatic tape. It is in front of you at all times.



(Testimony of Fred R. Kilbourn)

Q. Do you have the original reading here in court or down at Los Angeles for the 11,339 barrels?

A. We have.

Q. Could you show it to me, or your figures on that?

A. I think it is that 171 there, Mr. Hall. That is tank 8. This is tank 62. It is four feet six and fifteen-sixteenths less eight and seven-sixteenths of water. 473,696 gallons.

Q. Now, this sheet, as I understand it, over at the left it says "On hand at close," and then underneath it says "or before commencing business April 24, 1943."

A. The pumping was done April 23rd. I can explain that. We have a gauger and the gauge book is here. He goes around and puts it in his book. We do our gauging at 5:00 o'clock in the morning. He goes down and does his gauging at 5:00 o'clock in the morning. We want to get the reports in the office by 1:00 or 2:00 o'clock. We have some 61-odd tanks to do, and it takes him that long. [42]

Now, the twenty-third gauge was made at 5:00 o'clock in the morning. When the Egg Harbor came in, we naturally gauged the tanks for the Egg Harbor at 1:00 o'clock or whatever time that we started pumping. So, we use that gauge on that tank 8 and 61 until that boat leaves our dock. It may be there two or three days, and during that time we have no gauge except the original gauge, so we naturally use that original gauge.

That gauge was originally made on the 23rd, which was the time we made one on the Egg Harbor. There was no other chance, so we used that last gauge. That was the Egg Harbor's gauge on the 23rd and it appears on the 24th sheet as on the work sheet. You will probably find the same gauge on the 25th.

(Testimony of Fred R. Kilbourn)

Q. In other words, this gauge of 473,696 gallons appearing on sheet dated April 24, 1943, is the gauge for tank 62 before discharge from the Egg Harbor was commenced? A. That is right, yes.

Q. How many gallons in a barrel?

A. 42 gallons in a barrel.

Mr. Hall: May I interrupt?

Mr. Mack: Yes.

Mr. Hall: May we have the record show that this sheet you are referring to shows a temperature of 51 degrees Fahrenheit whereas you and I, in this lawsuit, have always been using a measurement at 60 degrees. [43]

Mr. Mack: That is right.

Mr. Hall: So, there has to be that further adjustment.

Mr. Mack: Yes.

Q. By Mr. Mack: This sheet was taken at a temperature of 51 degrees? A. Yes.

Q. What difference is there, if any, in the volume of gasoline at, say a temperature of 51 degrees and 60 degrees with the amount involved here?

A. Well, the volume would be less at the lower degree than at the higher degree. It expands at the higher degree.

Q. It expands as the temperature increases?

A. Yes.

Q. Now, correspondingly, from the sheet you also have in front of you, there appears to be a gauge for tank 61? A. Yes.

Q. Is that gauge for tank 61 as it was before any gasoline from the Egg Harbor was put into tank 61?

A. No. That gauge was made at 5:00 o'clock in the morning.

(Testimony of Fred R. Kilbourn)

Q. I see. 5:00 o'clock in the morning of April 24th?

A. Yes.

Q. Now, you stated that the gasoline in tank 62, 11,339 barrels, was merchantable. Is that correct?

A. Yes, that was merchantable gas. We were using that gas right along. [44]

Q. Were you selling it to customers?

A. Yes, to customers and delivering out of that tank.

Q. Now, likewise, Mr. Kilbourn, with respect to the diesel oil, I believe you stated there were 2,376 barrels in tank 8 before discharging from the Egg Harbor commenced?

A. That is right.

Q. Do you have the gauge record on that?

A. Yes, it is the same date, the work sheet. We have fuel oil and gas oil on a different sheet. It is one foot eleven-sixteenths less one and three-eighths inches water.

Q. You are pointing to another sheet, which is the daily bulk stock record, dated April 24, 1943. Is that right?

A. Yes.

Q. And you are pointing to the figure 99,459 gallons. Is that right?

A. Yes.

Q. Translated into barrels, that is 2,376 barrels?

A. Yes, at 51 degrees.

Q. That is at 51 degrees?

A. That is right.

Q. That measurement was likewise made before the Egg Harbor commenced discharging diesel oil. Is that correct?

A. Yes.

Q. That was likewise merchantable, was it not?

A. Yes, merchantable product.



(Testimony of Fred R. Kilbourn)

Q. Had you been selling out of that tank number 8?  
[45] A. We had, yes.

Q. Now, the gauge figures that you have mentioned here, were the Standard Oil Company's alone, were they not? A. They were, yes.

Q. The ship had nothing whatever to do with the taking of any of those figures? A. No.

Q. Now, Mr. Kilbourn, when this discharge of gasoline commenced from the Egg Harbor on April 23rd around 1:45 in the afternoon, was a sample taken by Standard Oil at your riser? A. It was, yes.

Q. And what did that sample show?

A. The sample showed it had very good color and there was no sign of any diesel contamination at all in there.

Q. In other words, so far as you could tell at that time, it was merchantable gasoline?

A. Yes, clear gasoline.

Q. Then, about a half hour later or so, as I understand it, they started pumping diesel oil?

A. That is right.

Q. Now, when they started pumping diesel oil about a half hour later, did you take a sample from your bleeder or riser?

A. I did not. The gauger took the sample as soon as we started pumping to be sure it was diesel oil coming through [46] that line.

Q. And so far as could be told at that time it showed the diesel oil to be all right?

A. It looked fine and dandy.

Q. Now, if we stay on gasoline for a little while, was another sample taken from your bleeder or riser after the sample at 1:45? A. It was.



(Testimony of Fred R. Kilbourn)

Q. When was that?

A. Oh, approximately about an hour later.

Q. About an hour later? A. Yes.

Q. What did that sample show?

A. It was all right. It was apparently very good.

Q. So, up to that point, your records show the gasoline coming out of the boat was all right?

A. It was all right.

Q. Now, was another sample taken from the bleeder or riser by your people after that one?

A. Yes. There was another taken about 3:00 o'clock or 3:30. It was 3:00 o'clock, I believe.

Q. What did that show?

A. It showed very good. It was a good color gas.

Q. So, up to that point at 3:00 o'clock or 3:30, your test showed the gasoline coming off the boat was all right? A. Yes. [47]

Q. Now, up to that point, did you have any check or measurement of gasoline that had come off the Egg Harbor in good shape?

A. Up to the second or third test?

Q. Yes, at 3:30.

A. No. We had no accurate test. The gauger goes out to these tanks and looks to see that there is no break in the line. He looks at the automatic gauge, and of course it is bouncing up and down from the pulsation of the pumps. That is the only test. There was no definite quantity that can be shown how much is in there. It is just a precaution to show that the tank isn't pumped over.

Q. At Point Wells, did you have any meter on the hose as the gasoline came off, any gallonage or barrelage?

A. No, there was nothing of that kind.

(Testimony of Fred R. Kilbourn)

Q. So that up to the time of 3:30 in the afternoon at least, you had no test made or any measurement taken to show how much clear gasoline had come off the ship?

A. No.

Q. When was it that the first test you made showed the gasoline was off?

A. A little after 4:00, about 4:20, I believe. It was between 4:00 and 4:20. About 4:20, I think it was.

Q. Then, on the gasoline, your gauger, I believe Mr. Lonsdale— A. Mr. Lonsdale. [48]

Q. Mr. Lonsdale informed you that the test on the gasoline was off about 4:20 in the afternoon of the 23rd?

A. That was Mr. Knudson, not Lonsdale. They change gaugers about a quarter to 4:00.

Q. I see. It was at that time, as I understand it, that you then told the vessel to stop discharging?

A. That is right.

Q. And discharging was immediately stopped on both products. Is that right?

A. On both products, yes.

Q. Now, how long was it before any discharging operation was again commenced from the vessel?

A. Well, I would say around about, oh, maybe 6:00 or 7:00 o'clock. It was between 6:00 and 7:00 o'clock some time.

Q. Were you there the whole time?

A. I was, yes.

Q. When discharging was commenced again, was it of one product or both?

A. No. They started both pumps up again, started both diesel and the gas.

(Testimony of Fred R. Kilbourn)

Q. Now, was a sample taken by you or somebody under your supervision as pumping was resumed from the vessel? A. Yes, it was.

Q. With respect to the gasoline, what did that show, if anything?

A. That showed a dark contaminated color. [49]

Q. Is my understanding correct that within a few minutes after that time, say 15 minutes or so, discharging of both products was again stopped? A. It was.

Q. Then, discharging of one product at a time was commenced. Is that right? Was it some time later?

A. Yes. A few hours later we started on the diesel oil, the pumping alone.

Q. And then diesel was continued until approximately 6:00 o'clock the following morning?

A. That is right, 6:00 o'clock the following evening.

Q. 6:00 o'clock the following evening?

A. Yes. It was between 4:00 o'clock and 6:00 o'clock, I believe. It was the following p. m.

Q. Now, at any time during any of those tests on gasoline that we have been talking about, was there a representative of the United States or of the vessel present?

A. Yes. I showed Mr. Stevens and Mr. Hicks at the time they came out there. I showed him when they started the second pumping, the off color of that gasoline.

The Court: Wouldn't the second mate be representative of everybody in the absence of the first mate and the captain?

Mr. Mack: Yes, but I don't believe anybody else was shown—

(Testimony of Fred R. Kilbourn)

Q. By Mr. Mack: Was the second mate shown any samples?

A. I couldn't say. He may have been told. There was [50] quite a bit of excitement around there and everybody knew about it. I forget whether the officer on board came and looked at it or not.

Q. Generally speaking, Mr. Kilbourn, you had charge of the situation on shore and the vessel's crew most usually stayed on the vessel. Is that right?

A. Yes.

Q. Now, if we can go back to the diesel for a moment, the diesel was started about a half hour after the gasoline, wasn't it?

The Court: You have asked and answered that question before, counsel.

Mr. Mack: All right.

Q. By Mr. Mack: The samples taken of the diesel were taken in a similar manner to the gasoline samples?

A. They were, yes.

Q. About every hour? A. Yes.

Q. Were the samples of the diesel taken every hour after pumping of the diesel alone was being done?

A. Yes.

Q. Who took those samples? A. The gauger.

Q. Would that be Mr. Knudson or Mr. Lonsdale?

A. Either Mr. Knudson or Mr. Lonsdale. Mr. Lonsdale relieved Mr. Knudson after the eight-hour shift was up. They [51] switched off and on on a long pumping.

Q. Now, when was it that you first learned, if you did, that there was something wrong with the diesel?



(Testimony of Fred R. Kilbourn)

A. Oh, it was the following 24th along, I would say, oh, between 11:00 o'clock and 1:00 o'clock in the afternoon. It was the middle of the afternoon.

Q. That was when you received a telephone report from Loucks Laboratories? A. Yes.

Q. You estimate that anywhere from 11:00 o'clock until 1:00 o'clock?

A. Around there some time. It was the middle of the day.

Q. Now, when you received that report from Loucks Laboratories, did you do anything about the diesel, so far as pouring it into any other tanks is concerned?

A. No. We were pumping tank 41 at that time and we just kept on pumping. We didn't change over at all.

The Court: You mean after you found out that the diesel in the tanks was contaminated, you continued to pump diesel?

The Witness: In tank 8, we finished pumping, and pumped tank 41 which was practically only a couple of hours pumping on 41 at the time.

The Court: And you continued to pump into this same tank?

The Witness: Yes. [52]

Q. By Mr. Mack: What is the capacity of tank 41?

A. I think that is a 53,000-barrel tank.

Q. Now, let us see if I am right on this. Did you commence pumping into tank 8 originally on the diesel, or tank 41? A. Tank 8.

Q. Tank 8? A. Yes.

Q. Now, what was the occasion for switching to tank 41?

A. Well, tank 8 wouldn't hold the whole cargo. It was a 37,000-barrel tank and we like to have more than

(Testimony of Fred R. Kilbourn)

one tank of diesel oil because we can either pump to the hills or the trucks and pump to a boat at the same time, getting two separate gauges as the boat—I am talking about a barge—37,000 or 40,000.

We can make an accurate gauge on the tanks without any withdrawal to the hills. So, as prearranged by the gauger and myself, we divided this cargo up and put half in tank 8 and half in tank 41. They were both down to what we call the pumping bottom. We couldn't pump any more. We figured about 18 feet in either tank.

I forget what the final division was. There was 18 feet in one and 19 in the other. So, we continued and got about 18 feet in tank 8, and then started pumping tank 41.

We did that so we would have an equal amount in each tank to draw from. [53]

Q. Tank 41, did that have any diesel oil in it before you started pumping?      A. Yes, it did.

Q. How much did it have in it?

A. I will have to look at the sheet to see. Tank 41 had one foot ten inches, 144,236 gallons at 51 degrees.

Q. At 51 degrees?      A. Yes.

Q. That would be something over 3,000 barrels in there?      A. Yes.

Mr. Hall: Do you understand, Mr. Mack, that we are not making any claims for damages on account of contamination of either tanks 41 or 61?

Mr. Mack: Well, I don't know, Mr. Hall.

The Court: Your claim covers 2,376 barrels in tank 8, does it not?

Mr. Mack: It does cover 3,000-odd barrels in tank 41.

Mr. Hall: Oh, no. We are not making any claim on account of contamination of tank 41 either before the

(Testimony of Fred R. Kilbourn)

cargo went into it or after. The same is true of the gasoline in tank 61.

Mr. Mack: Tank 61 is the tank into which the clear gasoline was finally placed?

Mr. Hall: That is right.

Q. By Mr. Mack: Mr. Kilbourn, as I understand it, samples were taken from all the vessel's tanks before [54] discharging operations commenced. Is that right?

A. Yes.

Q. No samples were taken by you or under your supervision and direction. Is that right?

A. No samples were taken under my supervision?

Q. Yes.

A. Well, yes, the original samples is a routine check made by the gauger, but the second set of samples we took, I was out there on deck and told him to take those samples because we didn't have enough, a large enough quantity. We had to get a quart can of each, so we took the samples over again.

Q. Those samples all showed clear, as I understand it?

A. The original ones did, yes.

Q. That is what I mean, the original samples showed a clear, good product?

A. Yes, a good product.

Q. So if my understanding is correct that discharging from the vessel was held up until the original samples were taken and checked, and you, or one of your representatives, informed the vessel that it was in order to commence discharging?

A. Yes. That is the gauger's job to see that they meet his specifications, and then he tells the ship to go ahead and start pumping.



(Testimony of Fred R. Kilbourn)

Q. Did anybody from the vessel or any representative of the vessel come ashore there and inspect your plant and [55] layout? A. No.

Q. Now, let us see if I understand the Loucks reports we have here. I refer first to Libelant's Exhibit 2, which has to do with diesel oil, as I understand it. Is that right? A. Yes.

Q. This sample was taken from tanks 5, 6 and 7 of the vessel? A. Yes, tanks 5, 6 and 7 of the vessel.

Q. Those were individual samples?

A. Individual samples, yes.

Q. As I understand it, that shows all that diesel oil to be merchantable? A. Yes.

Q. Here is the next report, Libelant's Exhibit 3, and that has to do with gasoline. Is that right?

A. Yes.

Q. What tanks are those?

A. Those are tanks 2, 3 and 4.

Q. What do they show?

A. That is Standard gasoline. Those are merchantable.

Q. There are a number of statements on here. For instance "distillation: boiling point" and then so many degrees Fahrenheit. But, translated, it means merchantable. Is that right?

A. Yes. When you see "end point 358," you know that [56] is pretty good gasoline.

Q. Here is Libelant's Exhibit 4. That shows the flash point taken of diesel on tank 8?

A. That is right, of diesel on tank 8.



(Testimony of Fred R. Kilbourn)

Q. What does that show as to the merchantability?

A. It is unsatisfactory as merchantable.

Q. Why isn't that merchantable?

A. Well, it shows that the product flashes at room temperature, which is about 70 degrees, showing it was contaminated with gasoline.

Q. What is the usual flash point of diesel fuel oil?

A. Oh, good diesel will run about 170, or perhaps 150. It runs up to 170 or 175. Some grades are a little higher. You get some at 160 or 170 which is very good.

Q. So that a flash point of 70 degrees, in plain language, means that it take a lower temperature to ignite the product at 70 than it would at 170?

A. Yes.

Mr. Hall: May I have the last question and answer read?

(Record read.)

Q. By Mr. Mack: What is the ordinary gas point of flash of Standard gasoline?

A. Oh, it will flash at any temperature below down to minus. We don't use flash on gasoline. We use a distillation.

Q. What tank does Libelant's Exhibit 5 show on the Loucks report? [57]

A. It refers to tank 62 of Standard gasoline. It is an unmerchantable product. It has an end point of 510 degrees Fahrenheit, which is an indication of diesel being in the product.

(Testimony of Fred R. Kilbourn)

Q. Just so we are clear, Libelant's Exhibit 4 had to do with your shore tank No. 8? A. Yes.

Q. What is this Libelant's Exhibit No. 6, as long as we have it here?

A. Libelant's Exhibit 6 is a final report after the pumping was finished on diesel oil. It shows a test on tank 41 and tank 8, which is a check test on 8 again.

Q. That shows merchantable, does it?

A. It does on tank 41, and on tank 8, it definitely does not.

Q. It is good on tank 41 and bad on tank 8?

A. That is right.

Q. What is this Libelant's Exhibit 7?

A. That is the final test on tank 61 after pumping.

Q. What does that show?

A. That shows merchantable products.

The Court: I think we will take our afternoon recess at this time. I don't know how long this is going to last. We are going along very slowly. I don't know whether we should have later hours, or if you gentlemen are going to speed up. We have been all morning with this one witness to [58] bring out very few facts, and if that is the rate we are going, we will be here all week.

Mr. Mack: Well, your Honor, I want to go into these things.

The Court: All right. We will take a recess until 1:30, gentlemen.

(Whereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock p. m. of the same day.) [59]

Los Angeles, California, Tuesday, January 30, 1945.  
1:30 p. m.

The Court: Proceed, gentlemen.

FRED R. KILBOURN

resumed the stand as a witness by and on behalf of the libelant and was examined and testified further as follows:

Cross-Examination

(continued.)

By Mr. Mack:

Q. Mr. Kilbourn, as I understand it, the diesel was diverted about 6:00 o'clock on the morning of April 24th from your shore tank 8 into your shore tank 41. Is that right? A. Yes.

Q. And then the diesel continued into your shore tank 41 until it was all discharged from the ship, and as I understand it, the discharge stopped about 6:10 p. m. on April 24th. Is that right? A. That is right.

Q. Now, then, the sample you took from shore tank 41 after all the discharge was finished showed that that tank 41 was merchantable. Is that right?

A. That is right.

Q. Therefore, did you conclude that from the time the diversion took place into tank 41 about 6:00 o'clock in the morning of April 24th. the diesel that was discharged from the vessel into tank 41 was merchantable diesel? [60] A. Yes.

Q. Now, do you also conclude that for some period prior to 6:00 o'clock on the morning of April 24, the diesel that was being discharged from the vessel was merchantable?

(Testimony of Fred R. Kilbourn)

Mr. Hall: That is objected to as no proper foundation being laid. There has been no basis shown for the expression of opinion upon that particular point.

The Court: Well, the purpose was to determine whether there was any other merchantable oil or diesel which had been pumped into tank 8 after you had notice of the contamination. You wouldn't have any claim if you continued to cause that oil to commingle with the other.

Mr. Hall: That is true, your Honor, but the evidence so far shows that our first knowledge that the diesel was contaminated came somewhere between 11:00 o'clock and 1:00 o'clock on the 24th. Now, the change from tank 8 to tank 41 occurred at 6:00 o'clock or 6:20, whatever it is, in the morning.

The Court: I know, but he is trying to ascertain whether, before he changed to tank 41, they were getting merchantable oil, if he knows.

Mr. Hall: Then, I will add to my objection the fact that it is immaterial because we didn't know at that time that there was anything wrong with the diesel.

The Court: If the witness says he doesn't know, that is the answer. I don't know whether he knows or not. You may [61] answer the question.

The Witness: No. I didn't know, outside of the sight test that there was anything the matter. We couldn't tell until we had the flash on the diesel. Apparently it looked fine. It was a nice color. There was no apparent odor to it at all.

Q. By Mr. Mack: As I understand it, you got your Loucks report over the telephone between 11:00 o'clock



(Testimony of Fred R. Kilbourn)

and 1:00 o'clock in the afternoon, between 11:00 a. m. and 1:00 p. m. on April 24, about the diesel?

A. Yes.

Q. Now, that was with reference, however, to the contents of shore tank 8, was it not?

A. That is right.

Q. That sample from shore tank 8 had been taken in the evening of April 23rd?

A. No, it had not. It was taken on the morning of the 24th.

The Court: 5:00 o'clock in the morning.

The Witness: No, pardon me. It was taken around about 8:00 or half past 8:00.

Q. By Mr. Mack: Well, then, I misunderstood, because I understood that samples had been taken on the evening of April 23rd by Mr. Knudson.

A. Mr. Knudson took the samples on board the boat that evening, and tank 62— [62]

Q. In other words, the samples were taken on board the Egg Harbor by Mr. Knudson from the various tanks on the evening of April 23rd. Is that right?

A. Yes.

Q. Do you have any idea what time that was?

A. No, I have not. It was late in the evening I know.

Q. Was it before or after discharge of the diesel had started on that evening?

A. Oh, it was after the discharge started. Yes, it was after the discharge started.

The Court: Let me ask you this question. Did you put any more diesel oil in tank 8 after you learned that it was contaminated?

(Testimony of Fred R. Kilbourn)

The Witness: No.

The Court: How about the gasoline?

The Witness: No. We stopped pumping in tank 62 as soon as we stopped the original pumping at 4:30, I believe. There was no more put in the tank except what little there was in the line, we shoved in the tank to clear the line.

Q. By Mr. Mack: As I understand it, Mr. Kilbourn, you were already taking or receiving diesel in tank 41 when you learned the outcome of the report?

A. That is right.

Q. And then you continued to receive into tank 41 until all the diesel was discharged? A. Yes. [63]

Q. And the contents of tank 41, as determined from the tests taken after everything had been discharged, was merchantable? A. Merchantable, yes.

Q. Now, as I understand it, speaking about the diesel again, Libellant's Exhibit 2, this Loucks report, shows the test of the diesel oil from tanks 5, 6 and 7 of the Egg Harbor? A. Yes.

Q. And that test was made during the evening of April 23rd?

A. The test was made the following day.

Q. Excuse me. The samples from which the test was made, as shown on Exhibit 2, were taken during the evening of April 23rd? A. That is right.

Q. What time was that, as near as you recall?

A. Well, I think it was around 9:00 o'clock, half past 8:00 or 9:00 o'clock when we started pumping again.

Q. And the sample from 5, 6, and 7 of the ship's tanks showed merchantable diesel?

A. That is right.

(Testimony of Fred R. Kilbourn)

Q. So that at any rate around 9:30 or during the evening of April 23rd when the diesel samples were taken from tanks 5, 6 and 7 on the ship, the results of the test were merchantable diesel. Is that right? [64]

A. Yes.

Q. And pumping continued uninterrupted, as I understand it, during the night until about 6:00 o'clock the following morning when diversion was made from tank 8 to tank 41. Is that right? A. That is right.

Q. Was the diesel from the ship's tanks 5, 6 and 7 pumped during that night, do you know?

A. I don't know what tanks they pumped out during the night, whether they pumped all of them or separate ones, or how that came about.

Q. I am not clear, Mr. Kilbourn, when the sample was taken from shore tank 8.

A. It was taken between 8:00 and 9:00 o'clock in the morning, about 8:30, I imagine, Friday morning.

Mr. Hall: You mean the first sample, do you not?

Mr. Mack: Yes.

Mr. Hall: There was a later sample, you know, from that one tank.

Mr. Mack: That was about 8:00 or 9:00 o'clock in the morning of the 24th.

The Witness: Pretty close to 8:00, I imagine. It was 8:20 or 8:30 or around there.

Q. By Mr. Mack: And the results that you obtained from that sample and the test made by Loucks, you obtained some time between 11:00 o'clock and 1:00 o'clock? [65]

A. Yes, around there some time. It was the middle of the day.

(Testimony of Fred R. Kilbourn)

Q. And that result was bad?

A. That result was, yes, a 70 flash on that.

Q. Now, with respect to diesel oil, if there is gasoline in it, let us say, or it is contaminated with gasoline in any way, is there any change in the odor from it?

A. Diesel oil can be contaminated by a very small quantity of gasoline and the odor would not be detected at all. You have to have a pretty sensitive nose to smell gasoline in diesel.

Q. Ordinarily doesn't diesel oil of the kind handled here have a rather flat odor?

A. Diesel oil varies considerably in odor depending on the wash they put it through in the refinery. Some diesel comes through with practically no odor, and others have a very strong petroleum smell. I can't describe it, but it is very noticeable. In that case the diesel oil was very strong.

The Court: Well, I assume that a certain amount of contamination of the diesel oil with gasoline, if it was not too heavy, wouldn't hurt it any, would it?

The Witness: No. Gasoline could stand a certain amount of diesel oil.

The Court: And diesel oil could stand some gasoline?

The Witness: No, very little. You can take a tank that [66] has contained gasoline and pump it out dry and leave fumes in the tank and fill it up two-thirds or full, and there is enough gasoline vapors in there to lower the flash point four or five degrees without having any product in the tank at all. Of course, that isn't harmful because it allows a variance of 20 degrees there.

Q. By Mr. Mack: On the gasoline, as I understand it, there was no discharge from approximately 4:30 on



(Testimony of Fred R. Kilbourn)

the afternoon of April 23rd until the early evening of April 24th? A. That is right.

Q. During the interim, the diesel was going over. Is that right? A. Yes.

Q. And then the gasoline discharge was started a couple of hours or so after the diesel had stopped. Is that right? A. Yes.

Q. Now, what was the process there? I am not quite clear about what you did there when the gasoline first was resumed in the discharge.

A. We started on the single pumping. What we wanted to do was clear the lines of contaminated gasoline, that 18-inch line that runs from the dock to the tank 62. We wanted to clear that line of contaminated gasoline so that we could start pumping good gasoline.

Q. May I interrupt? You mean to clear that shore line? [67] A. Yes.

Q. Was it necessary to use your own pumping facilities?

A. No, we used the boat. We have no way of pumping from the boat. So, we started taking samples. I stood there myself and took samples of the headers. The ship's crew told me they were starting on one tank. I said, "All right. Pump a few minutes," and it was still brown. It started to clear up, and then we decided to pump from each tank to clear up any diesel that was in the bottom of the tank or in the pipe lines. They did it on the other three tanks, three and two. No. 3 cleared up readily, and No. 4 cleared up readily, and No. 2 took considerable time to clear up before we got clear gasoline. I think it was around, oh, 20 minutes or a half hour before we got clear gasoline through.

(Testimony of Fred R. Kilbourn)

After that was finished, we followed up the line and pumped this contaminated gasoline that was in the line to tank 62, and then changed over to tank 61 and resumed pumping.

The Court: Let me see if I understand this. Your first test that you made showed that each tank was uncontaminated?

The Witness: Yes.

The Court: And then when you started, after you had removed the diesel oil, your pumps reflected there was a certain amount of diesel oil in the bottom of the gasoline tanks?

The Witness: That is the only place we could figure it would be, and as they started pumping each new tank there [68] would be a period of contaminated gasoline and diesel coming out.

The Court: Well, your original tests didn't go to the bottom, did they?

The Witness: No. I imagine the test was around about 25 or 30 feet, and our samples are taken in the normal course about halfway down into the tank.

The Court: You don't know whether that diesel oil was there when the ship arrived, or whether during pumping operations it was dropped over into the other tank?

Mr. Hall: Does your Honor mean diesel oil in the bottom of the gasoline tanks?

The Court: I mean in the gasoline.

The Witness: That, I don't know.

The Court: But when you removed all the diesel and then started to pump the gasoline, at that time the bottom of the tanks first showed contamination?

(Testimony of Fred R. Kilbourn)

The Witness: They did, yes.

The Court: And after you had removed a certain amount of the bottom, as I understand it, the pump pulled from the bottom?

The Witness: That is right.

The Court: And that way it cleared up?

The Witness: Yes, it cleared up on those two tanks very readily, and the No. 2 tank took a little longer. It took at least a half hour to clear that up before we had clear [69] gasoline.

Q. By Mr. Mack: Now, as I understand it, the sample which had been taken from the ship's tanks 2, 3 and 4 the evening before, those were the gasoline tanks, the report of Loucks showed that as merchantable?

A. Tanks 2, 3 and 4, yes. That is good gasoline.

Q. Now, that sample, as I understand it, was a composite sample from tanks 2, 3 and 4?

A. That is right.

Q. Taken around 9:30 or so on the evening of April 23rd?

A. They took those samples at the same time they took the diesel, and it could have been any time after 6:00 or 7:00 o'clock, or until 9:00 any time.

Q. In other words, possibly the samples were taken before discharge of the diesel started around 9:30?

A. Could have been, yes, either way, before or afterwards.

Q. And the report. Libelant's Exhibit 3 on the sample from tanks 2, 3 and 4 of the ship, the gasoline tanks, showed good gasoline? A. Good gasoline.

Q. Then, as I understand it, when discharge of the gasoline commenced on Saturday evening, April 24, 1943,



(Testimony of Fred R. Kilbourn)

at 8:00 p. m., as shown in the log here, your tests or samples showed some contamination. Is that right? [70]

A. That is right.

Q. Those were visual tests?

A. Visual samples in the glass bottles, yes.

Q. You took, as I understand it, the gasoline out of tank 4 first until it cleared, and received gasoline out of tank 4 from the vessel first until it cleared?

A. Either out of tank 3 or 4. I don't know which one first, but one of those. Tank 2 was the last one we took it out from.

Q. At any rate, you took it out of 3 or 4, one or the other, and then finally No. 2? A. Yes.

Q. And tank 2 was the one that took a little longer to clear than tank 3 or 4. Is that right?

A. Yes.

Q. As I understand it, the procedure in discharging the gasoline at that time was to pump the bottoms first by means of the suction lines. Is that right?

A. I presume that is the way the boat pumps off through suction lines. I don't know any other way to get it off.

Q. Had you given any instructions to the vessel or anybody on board about the manner of pumping gasoline out of tanks 2, 3 and 4?

A. None except it was mentioned in general discussion with the mate or Mr. Hicks, I forget which, that it was coming out that way, and we noticed, as soon as they changed [71] over to one tank it started to clear up. We decided to pump each tank first to get it cleared out of whatever had been in the bottom or the pipe lines.



(Testimony of Fred R. Kilbourn)

Q. Now, when those samples were taken, Mr. Kilbourn, regarding tests 2, 3 and 4 on the evening of April 24th—

Mr. Hall: 23rd.

Mr. Mack: I am talking now about the samples taken as the gasoline started to clear.

Mr. Hall: Those were taken at the headers.

Q. By Mr. Mack: When the samples were taken at the headers, were any members of the ship's crew or the company's representatives there?

A. Well, I think when we started in—no. I don't think anybody was there at present except a conversation between the crew on deck; that is the officer on deck and ourselves on shore, that the samples were coming dark, and when we started lighting up again, we told them to shut off pumping again. It was all verbal. They may have seen some of the samples and may not.

Q. Now, according to Libellant's Exhibit 6, as I understand it, that was the result of samples of shore tanks 41 and 8 taken after all discharging had ceased?

A. That is right.

Q. And shore tank 8 showed off and shore tank 41 showed good diesel?

A. It showed good diesel is right. [72]

The Court: Doesn't the diesel oil and the gasoline mix or become completely commingled?

The Witness: It will if it is agitated.

The Court: And if the agitation ceases?

The Witness: It will not separate.

The Court: It will not separate?

The Witness: No.

(Testimony of Fred R. Kilbourn)

The Court: Well, how would you account for diesel oil being on the bottom of the tank of the ship and the gasoline on the top?

The Witness: Well, that is something I can't account for unless there was some leak back into the tank. The diesel oil being of heavier gravity will naturally settle on the bottom, and the gasoline will separate itself. Without agitation, it can flow more easily.

Q. By Mr. Mack: Mr. Kilbourn, are you able to fix any time or point at which, in your opinion, the diesel became contaminated?

A. I assume the diesel was contaminated during the process of the two pumpings. That is, after all this test was gone through and we got that low flash point, we figured it must have been when they were pumping both products together for the first three hours or so.

Q. So that between 2:20, or whenever it was, on the afternoon of April 23rd, and approximately 4:30 when they were pumping diesel and gasoline, that is when you feel the diesel [73] became contaminated?

A. That is when I feel it might. That is about the only place it could have come about because we shut off all valves and pumped the one product. That is the only time I could figure there was any chance for contamination in that period.

There might have been other chances for all I know, but that test, when we took it on tank 8, looked very much like that was when the contamination was taking place that evening.

Of course, that is an assumption, because we had no test made of the pumping.

(Testimony of Fred R. Kilbourn)

Q. Now, can you give me your best recollection whether the test on tank 8, shore tank 8, on the evening of April 23rd, was made before or after discharge of the diesel alone commenced?

Mr. Hall: Pardon me, counsel. The testimony was that that was on the morning of the 24th, from shore tank No. 8.

Mr. Mack: I am sorry. That is right.

The Court: I have listened to about all the questions I am going to listen to about criss-cross back and forth between these tanks, Mr. Mack.

Mr. Mack: Very well, your Honor. I am not trying to be tedious. I am trying not to overlook anything.

The Court: I don't know what you are trying to be, but you are getting to be.

Q. By Mr. Mack: Mr. Kilbourn, were there any samples [74] taken from gasoline by you or under your supervision, from shore tank 61 before discharge of gasoline commenced into it?

A. No. There is no sample taken of tank 61 before any pumping was commenced.

Q. What about shore tank 8 before discharging commenced from the Egg Harbor?

A. There was none there.

Mr. Mack: I think that is all.

#### Re-Direct Examination

By Mr. Hall:

Q. Was there any change made in the hoses from the vessel to the dock headers during this entire period we have been talking about?

A. There were no changes between the boat and the shore.



(Testimony of Fred R. Kilbourn)

Q. Referring to Libelant's Exhibit 1, I will ask you if the red line that apparently goes past the words "salt water pump house" and then up to something called a "block valve" and then down to another valve on the dock, is the line used when you are pumping gasoline out of either 61 or 62 onto a vessel?

A. Yes, that is right.

Q. Now, was that particular segment of the line that I have just mentioned, from V-1 valve through the salt water pump house, the block valve, and the block valve down to the dock, open at the time the gasoline was coming off the Egg Harbor? [75]

A. It was.

Q. Now, taking the entire red line shown on this exhibit, was there any mechanical device, either by a valve or otherwise, by which the flow of fluid from that line could be diverted into any other line?

A. No, there is not, or was not.

Q. And was there any mechanical device by which fluid from another line could be diverted into that red line?

A. There was not any connection at all between any other line.

Q. Was what you have just stated as being true with respect to the red line true also with respect to the blue line?

A. It is.

Q. Now, before the vessel started to unload, you have testified that there were samples taken from the vessel's tanks, and if I remember the testimony correctly, those bottle samples were taken from a point about halfway down the tank in the vessel. Is that correct?

A. Yes.



(Testimony of Fred R. Kilbourn)

Q. Is the same thing true with respect to the bottle samples that were taken from the vessel's tanks on the evening of April 23rd, that is, were they taken from a point about halfway down in the tank?

A. They were.

Q. Now, was it the practice at that time to take these [76] bottle samples from the vessel's tanks before the vessel discharged? A. It was.

Q. Was it the practice at that time to have those samples sent to a laboratory and tested before the vessel discharged? A. No, it was not.

Q. Then, if I understand you correctly, the purpose of those bottle sample tests before discharge commenced, was simply to ascertain the kind of commodity in a given tank by the appearance of the sample. Is that right?

A. Yes.

Q. Was there any other purpose?

A. Well, if there was, the only purpose would be in case of a contamination or a wrong product. If they billed us with Standard gasoline and had colored gas or road gas, we would catch it right there. We could tell by the color, or an aviation gas, which is a green gas.

Q. Now, after Mr. Hicks and Mr. Stevens came out to the plant and went aboard the vessel, and after a period of 15 minutes or so, according to your testimony, the pumps were started again, and discharging started again through both lines? A. Yes.

Q. Was that upon orders of either Mr. Hicks or Mr. Stevens? [77]

A. I forget which gentleman told us, but he said he figured that that disposed of the matter and we should go ahead; it was all right to go ahead and start pumping again.

(Testimony of Fred R. Kilbourn)

The Court: That has been testified to before, counsel. It has been covered.

Mr. Hall: I am sorry. I didn't know it had.

Q. By Mr. Hall: Now, when you went on board the tanker with Mr. Simonsen, you talked with the second mate, I think you said? A. Yes, sir.

Q. Did you ask him what the trouble was?

A. Yes. We asked him what seemed to be the trouble.

Q. What did he say?

A. Well, he said he didn't know, he not being a tanker man. I think it was his first trip on a tanker. He said the valves had been set by the first mate or the pump man, I forget which, and when they left the ship, it was supposed to be all right, and he didn't know anything about manipulation of the valves.

Q. Where was the second mate when you were talking to him, you and Mr. Simonsen?

A. We went up to his cabin. He was in his cabin and he walked out on the deck *after* the cabin and talked to us for awhile.

Q. You have made reference to 11,339 gallons of Standard gasoline that was in tank 62 before unloading [78] commenced, and to 2,376 gallons of diesel in tank 8 before unloading commenced. Are those quantities given to us at 60 degrees Fahrenheit? A. Yes.

Q. And is that the temperature which is used as a standard temperature for measuring petroleum products in the petroleum industry?

A. It is a 60 degree. Everything is corrected to 60 degrees.

Mr. Hall: That is all.

(Testimony of Fred R. Kilbourn)

Mr. Mack: Mr. Hall, I think you inadvertently said "gallons."

Mr. Hall: If I did, I should have said "barrels."

Q. By Mr. Hall: Did you understand me to mean barrels in my last question?

A. Yes, barrels is correct.

Mr. Hall: That is all.

Mr. Mack: That is all.

The Court: You are excused.

(Witness excused.)

L. SIMONSEN,

called as a witness by and on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: L. Simonsen. [79]

Direct Examination

By Mr. Hall:

Q. Are you employed by Standard Oil Company of California, Mr. Simonsen? A. Yes, sir.

Q. How long have you been in their employ?

A. Approximately 27 years, sir.

Q. What is your present position with the company?

A. Marine superintendent of the Northern Division.

Q. Where are you located?

A. Our office is located at Point Wells, Washington, 15 miles north of Seattle.

Q. How long have you been located at Point Wells?

A. Our office has been located there since about 1931.

The Court: How long have you been there?

The Witness: Since 1931 at Point Wells.

(Testimony of L. Simonsen)

Q. By Mr. Hall: Have you been marine superintendent there all that time? A. Yes, sir.

Q. Now, prior to being a marine superintendent at Point Wells, have you had any experience on tankers?

A. Yes, sir. I have had considerable experience on tankers, but answering your question, prior to that time I was also assistant marine superintendent. I was assistant marine superintendent from about 1920.

Q. Are you a licensed marine engineer? [80]

A. Yes, sir.

Q. How long have you been such?

A. I have been a licensed marine engineer approximately 30 years.

Q. Have you had practical experience on tankers as an engineer? A. Yes, sir.

Q. Now, taking up your duties as assistant marine superintendent and marine superintendent at Point Wells, will you tell us briefly and in general what those duties were?

A. Well, the duties consist of supervision of complete operations of tankers in my district; supervision of repairs; installation of pipe lines, engines, all equipment pertaining to the operations of tankers; and also all personnel increases, victualing of ships, et cetera.

Q. During the years you were assistant marine superintendent and down to the time of the present war, when a Standard Oil tanker would be taken into some shipyard in the vicinity of Seattle for repairs, would you have anything to do with the repairs?

A. All repairs were under my direct supervision.

Q. During that period of time while you have been assistant superintendent and superintendent at Point



(Testimony of L. Simonsen)

Wells, have you had anything to do with the cargo arrangement of tankers?

A. Yes, sir. Practically every ship that is loaded, I have something to do with. That is, when I am in the [81] office.

Q. You mean by that Standard Oil tankers?

A. Yes.

Q. You don't exercise any supervision over the cargo arrangement of other tankers not operated by Standard Oil Company, do you?

A. I have nothing to do with them, sir.

Q. Do you recall the time when the Egg Harbor came to the dock at Point Wells on April 23, 1943?

A. Yes, sir.

Q. Were you present at the Standard Oil marine terminal where that vessel was tied up that day?

A. I was in the office at the time, sir. No, she tied up in the morning at 5:00 o'clock. I was not.

Q. When you came there in the morning, was the vessel tied up at the dock? A. Yes, sir.

Q. Thereafter, did you meet the captain of the vessel? A. Yes, sir.

Q. Do you remember his name?

A. Captain Olsen, I believe.

Q. Did he come to your office? A. Yes.

Q. Did you have a conversation with him?

A. I passed the time of day, yes, sir.

Q. In the course of that conversation, did he say [82] anything about his crew?

A. Yes. We discussed his crew.

Q. What did he say about his crew?

A. He said his crew was very, very inefficient, very inexperienced; that he had a green crew.

(Testimony of L. Simonsen)

Q. Now, do you recall going on board the SS. Egg Harbor after contamination had been discovered at the dock headers?      A. Yes, sir.

Q. Who was with you?      A. Mr. Kilbourn.

Q. Was that in the evening of that first day?

A. Yes, sir. It was around about, I should say, between 5:00 and 5:30, as near as I can recall.

Q. Who did you ask for when you got on board?

A. We came aboard there. There were two men on deck and we asked for the mate. The reply was that the mate was not aboard.

Then, I asked for the second mate. I mean, I asked for the man on watch, and what mate it was, the third or second. They replied it was the second mate.

Q. Why didn't you ask for the master? Did you know he was away?

A. I knew he was ashore, yes, sir.

Q. Then you asked for the mate on watch?

A. Yes, and was told he was in his room, and we were [83] directed to his room.

Q. You went to his room?      A. Yes, sir.

Q. Did you have a talk with the second mate?

A. Yes, sir.

Q. What did he say in the course of that conversation?

A. Well, starting the conversation, I said to the second mate, "I hear you are having trouble on here."

He said, "Well, I have heard that too."

I said, "What is the trouble?"

He said, "Well, I don't know. They say we are mixing the cargo, mixing products."

(Testimony of L. Simonsen)

I said, "Just as a matter of information, I have nothing to do with it, but just as a matter of information, how are you pumping this cargo out?"

He said, "I don't know."

He said, "I have nothing to do with it." He said, "I don't know the piping arrangement nor the valve setup."

I said to him, "Have you any plans that would show the piping manifold and setup of the ship?"

His reply was, "No. not that I know of, but I have a storage plan."

I said, "May we see that?" I said, "We are just aboard here to see if we can kind of figure this thing out and help you in every way we possibly can."

He said, "Well, we would be glad to have some help." [84] He showed me the plan, and it was very clear on the plan—

Q. Just a moment, not what you saw. What else did he say?

A. Well, in our discussion he mentioned—I asked about the mate. He said the mate was ashore.

Also, in our discussion he mentioned the mate had set the valves prior to going ashore and he, the second mate, didn't know how the valves were set.

Q. Did he say that the first mate had told him not to worry?

A. That's right. He said, "He told us not to worry about them, they were set."

Q. Did he say that he wasn't worrying?

A. He indicated that he was not worrying.

Q. I just want to know what he said.

A. Yes, he indicated that he was not worrying about it, about the pumping arrangement whatsoever.

(Testimony of L. Simonsen)

Q. I show you a plat, and ask you if that is the plan of the cargo piping arrangement which that second mate gave you on that occasion?

A. That is the very one, yes, sir. That is the plan.

The Court: Any objection to its admission?

Mr. Mack: No, your Honor.

The Court: It may be received.

(The document referred to was received in evidence as Libellant's Exhibit No. 8.) [85]

Q. By Mr. Hall: Did you subsequently ascertain which tanks in the vessel were carrying or had been loaded with Standard gasoline, and which tanks with diesel?

A. Yes, sir. After we got the storage plan, so far as that was concerned, I knew what tanks were carrying what.

Q. You might tell us now which tanks were supposed to have gasoline and which were supposed to have diesel.

A. Tanks 2, 3, 4, and 8—pardon me, I mean 9, were supposed to have gasoline.

The Court: What are the numbers again?

The Witness: 2, 3, 4, and 9 were supposed to have gasoline in them. Tanks 5, 6, 7, and 8 were diesel oil. Those were the cargo I put down there.

The Court: This "D/B" means?

The Witness: Diesel burner.

Q. By Mr. Hall: Now, after you talked to the second mate, did you and Mr. Kilbourn talk to anyone on the vessel on that occasion?

A. Yes, sir. After we had a little discussion there with the second mate, we asked if it would be all right to look over this manifolding setup, which he agreed to.



(Testimony of L. Simonsen)

Q. I want who else you talked to, not what you did after that, but did you talk to anybody else on that trip on board the vessel? A. Yes.

Q. Who? [86] A. The assistant pump man.

Q. Why didn't you talk to the head pump man?

A. He was not there, sir. He was also ashore.

Q. Was Mr. Kilbourn with you?

A. Yes, sir.

Q. What did the assistant pump man say?

A. I asked the assistant pump man a few questions regarding the pumping arrangement, the seating of the valves and so forth, and his reply was that he didn't know anything about the seating of the valves. The valves were set, according to him, by the pump man, and he was told that he didn't need to worry about it, that before they got down to the point where they would be stripping, why, he would be back aboard.

Q. And the head pump man was gone from the vessel? A. Yes, sir.

Q. Did you that day go in the pump room?

A. No, sir.

Q. Was this visit to the vessel that you and Mr. Kilbourn paid on the afternoon of the 23rd the only visit you made to the vessel that day?

A. No, sir. I had gone aboard some time in the forenoon and passed the time of day with the chief mate.

Q. That was in the forenoon? A. Yes, sir.

Q. Before discharging commenced? [87]

A. Yes, sir.

Q. Those were the only times you were on the vessel that day? A. Yes, sir.

Q. Did you go on the vessel the next day?

A. Yes, sir.

(Testimony of L. Simonsen)

Q. Was anyone with you?

A. No, sir. Well, pardon me. Mr. Kilbourn, I believe, went aboard with me. Both of us went together and just made a visit. They were at that time pumping diesel oil.

Q. Did you at any time on the 24th go into the pump room?      A. Yes, sir.

Mr. Hall: If the court please. I have here a plat showing the cargo piping arrangement of the vessel which is a little bit more suitable than this black and white print.

The Court: Is there any objection to the admission?

Mr. Mack: Is that the—

Mr. Hall: This is Libelant's Exhibit A for identification in connection with the deposition of Captain Olsen, and you will recall the Captain said this was a correct plat of the piping arrangement of the vessel.

Mr. Mack: All right.

Mr. Hall: I will ask that it be received in evidence, then.

The Court: It may be so marked. [88]

(The document referred to was marked as Libelant's Exhibit No. 9, and was received in evidence.)

Q. By Mr. Hall: I show you Libelant's Exhibit 9, Mr. Simonsen, and ask you if the lower half of the sheet shows the piping arrangement in the bottom of the several tanks of the vessel numbered 1 to 9 inclusive.

A. That is correct, sir, it does.

Q. And to the left of the plat, I will ask you if the various pipes there depicted are the pipes and other facilities which are in the pump room of the vessel.

A. Yes, sir. It appears that is the setup.

(Testimony of L. Simonsen)

Q. Now, there are certain of these pipes, still speaking of the lower half of the plat, which are colored in red. I will ask you if those are the main suction pipes which draw the fluid in the tanks toward the pumps at the rear of the vessel?

A. These are the tanks that draw the fluid out of the tanks, sir (indicating).

Q. You mean the pipes—

The Witness: Yes, that draw the fluid out.

The Court: This mark here shows—

The Witness: Yes, sir, that shows suction and loading, see. You can either load through these lines or discharge through them.

Mr. Hall: We will take it a step at a time, Mr. Simonsen.

The Witness: The Judge asked me that.

Q. By Mr. Hall: I will mark one line of the main suc- [89] tion pipe as "A" and one main line as "B" and one main line as "C", my markings being placed in tank 8, and I will ask you what tanks line "C" is designed to suck the petroleum cargo out of?

A. Primarily line C is to suck out of tanks 1, 2, 3 and 4.

The Court: Just a moment. Do I understand that this line that he has marked sucks more than one tank?

The Witness: Yes, sir. There are various suctions. Here is this main line, sir. There is a branch suction from that line that goes to your various compartments. Tank 2 here has three compartments in it.

Q. By Mr. Hall: Take No. 2. There is a device which I will mark with the letter "D". What is that?

A. That is a suction stool, sir.

(Testimony of L. Simonsen)

Q. And that suction stool is on the bottom of the tank?

A. Very close to the bottom, probably that would be one inch from the bottom.

Q. And it is connected with the pipe that runs laterally through the several compartments of tank 2?

A. That is right, sir.

Q. Now, each tank has a port compartment, a center compartment and a starboard compartment, do they not?

A. Yes.

Q. Now, I will mark another device here with the letter "E" and ask you what that is? [90]

A. That is also a suction stool, sir.

Q. And that is in the center compartment of tank 2, is it not? A. Yes.

Q. Now, I will mark another device here with the letter "F", and ask you what that is?

A. That is also a suction stool, sir.

Q. Now, at various points on this pipe which is marked "C" there appear to be devices which look like a gentleman's bow tie. What are they?

A. They are the master valves.

Q. That master valve is a gate valve?

A. Yes.

Q. It is operated, is it not, by a stem that runs up to the deck of the vessel and there terminates in a wheel?

A. Yes.

The Court: Those valves are so that you can make each tank a separate compartment?

The Witness: Yes, sir, that is right, separate so far as the valves are concerned. You can close this side off and be pumping out here.



(Testimony of L. Simonsen)

The Court: For instance, take a compartment in 2 and 3. Through those valves, could you put gasoline in one and diesel in another and keep them from comingling?

The Witness: Not simultaneously, no, sir.

The Court: I mean, after they are in there. Is there [91] any way to load those tanks separately one from the other?

The Witness: Yes, you can load them. You can load No. 2 tank, close the valves off and load No. 3 tank.

The Court: With a different grade of oil?

The Witness: If you want to rely on your valves.

The Court: It is possible?

The Witness: Yes, sir.

Q. By Mr. Hall: Now, you notice that in each of these tanks there is what I will call a lateral pipe which connects with the stools in the three compartments of the particular tank. Is that correct?

A. Yes, sir. That is what we call the athwartship line.

Q. Now, for instance, pipe C is directly connected, is it not, with the athwartship pipe in the bottom of tanks 2, 3, and 4? A. Yes, sir.

Q. But it is not connected with the athwartship pipe in the bottom of any of the other tanks, is it?

A. Not that line alone, no, sir.

Q. Let us go to line B. Line B is connected, is it not, with the—

The Court: It is the same condition as the other end of the ship?

The Witness: Yes.

Q. By Mr. Hall: What athwartship line is B connected with directly? [92] A. 5, 6, and 7.

(Testimony of L. Simonsen)

Q. Not directly with 7, is it?

A. Yes. Pardon me, I am wrong. No, sir, with 5 and 6 directly.

Q. All right. What athwartship line is pipe A connected with? [92a]

A. 7, 8 and 9, sir.

Q. Now, there is a line of pipe, red pipe on this plat apparently connecting line B and line C. I am going to mark that connecting line of pipe with the letter "G", and ask you if that is what is called a cross-over between line B and line C?

A. That is right. That is called a cross-over. That is the normal phrase for that.

Q. Now, I am going to mark another line of pipe apparently connecting A and B with the letter "H" and ask you if that is another cross-over?

A. Yes, it is another cross-over.

Q. Now, I call your attention to the fact that in cross-over G, there are two valves close together.

A. Yes, sir.

Q. Those are the gate valves that you have described?

A. Yes.

Q. I call your attention to the fact that in cross-over H there are two more valves close together.

A. We call those "block valves."

Q. That is another pair of gate valves?

A. Yes, sir.

The Court: They work from the deck?

The Witness: Yes.

Q. By Mr. Hall: Now, I observe by this chart that these pipes which I have called A, B, and C, run back into [93] the pump room and eventually run into a facility marked as a pump. Is that correct?

(Testimony of L. Simonsen)

A. Yes, sir.

Q. Then, loading from the same pump, there is a blue line of pipe which goes toward the top of the chart and emerges apparently on the deck. Is that the discharge?

A. That is the discharge line, sir.

Q. I have marked this line on the upper half of the chart with the letter "I". Would you say that this is the discharge line discharging from the same pump that line C sucks the fluid into?

A. I will have to follow that. Offhand I would say it is right, sir. Yes, it is. That is correct.

Q. All right. I will mark another line up here on the upper half of the chart with the letter "J" and ask you if that is the discharge line that corresponds with the suction line B?

A. I will follow that down, sir, and take a look. Yes, sir, that is correct.

Q. I will mark another line on the upper half of the chart with the letter "K" and ask you if that is a discharge line which takes the fluid from the pump which sucks the fluid out of the tanks through line A?

A. Yes, that is correct.

Q. Now, I observe on the upper part of the chart these lines J, I, and K, meet blue lines running at right angles.  
[94]

A. Yes, sir. Those are the discharge lines on deck.

Q. And those lines that I have been last talking about have at the ends of them the description, "Cargo oil discharge overboard"? A. Yes, sir.

Q. Both at the bottom and top?

A. Port and starboard side, yes, sir.

(Testimony of L. Simonsen)

Q. And the vessel can discharge from either side?

A. That is correct, sir.

The Court: Is that their point of discharge?

The Witness: Yes, sir.

Q. By Mr. Hall: Now, I call your attention to a red line on the suction side between lines A and B; this connecting line, however, being in the pump room, and I will designate it by the letter "L" and ask you if that is another cross-over line between line A and line B?

A. That is another cross-over line between A and B.

Q. That is in the pump room?

A. Yes, sir.

Q. I will call your attention to another line in the pump room between line B and line C. I will give it the letter "M" and ask you if that is another cross-over between line B and line C in the pump room?

A. Yes, sir, that is also another cross-over between B and C in the pump room.

Q. Now, I call your attention to certain lines in the [95] pump room on the discharge side, and I will designate one by the letter "N" and ask you if that is another cross-over between lines K and J on the discharge side?

A. Between K and I, I believe, sir. I believe that is between K and I.

Q. Anyway, they are cross-overs?

A. Yes, sir, cross-over lines between K and I, yes, sir.

Q. Not between K and I?

A. Isn't that I? I am sorry, no, that is J. You are right.

Q. Then the line marked N is a cross-over on the discharge side between the lines K and J?

A. That is right.



(Testimony of L. Simonsen)

Q. Now, I will mark another line here with the letter "O" and ask you if that is another cross-over on the discharge side?

A. That is also another cross-over between J and I.

Q. Now, on the cross-over which has been marked N, there is a regular valve gate there, isn't there?

A. There are two, sir, two valves.

Q. And also another valve which by reference to the legend on the chart is called "gate valve with spectacle flange." Do you notice that? A. Yes.

Q. I call your attention to the cross-over which has been marked "O" and you will notice the regular valve and also [96] one of these valves which is designated as a gate valve with spectacle flange. You notice that?

A. Yes, sir. That's right, sir.

Mr. Hall: May I have this model marked for identification?

(The model referred to was marked as Libelant's Exhibit No. 10, for identification.)

Q. By Mr. Hall: I show you a device, Mr. Simonsen, which has been marked for identification as Libelant's Exhibit 10, and ask you if that is a model of a gauge of a spectacle flange?

A. That is definitely a model of a spectacle flange, yes, sir.

Q. I will ask you if the device takes its name from the blank which is inserted in the slot between the flanges of the pipe, as resembling somewhat a spectacle?

A. I can't answer that for sure. We have always termed it a spectacle. I presume it is because of the way it is made. There is a blank and an open space, sir.

(Testimony of L. Simonsen)

One side is open and the other side is blind. This is called a spectacle.

Q. Now, I have taken off the nuts and bolts on this model, and I have taken out a piece shaped somewhat like the letter 8.

The Court: The fact is that when they want it open, they have it one way, and when they want it closed, they have [97] it the other way, don't they?

The Witness: That is right, sir. Now it is in the closed position and no product can go between.

Q. By Mr. Hall: Now, this particular model has only four bolts and nuts on it. As a matter of fact, on the larger pipe there would be more bolts and nuts?

A. Yes, sir.

Q. Now, in this model there is a piece of cardboard on either side of the central blocking device. Does that have any counterpart in the original as it would appear in the vessel?

A. Yes, sir, very much. There is a gasket on each side. You have got a product on this side and one on this side, and you would have to have a protection to keep the liquid from getting into other tanks and a possible chance of contamination.

Q. Now, on this plat which is marked Libellant's Exhibit 9, in the lower half of the sheet there are shown some yellow lines, and I notice on here they are marked "6 strip suction." What are those yellow lines?

A. All stripper lines.

Q. Are those stripper lines suction lines?

A. Yes, sir. They are suction lines only, as I understand the plan.

(Testimony of L. Simonsen)

Q. Now, what is the necessity for having stripper suction lines in addition to the regular 12-inch suction lines [98] which on this plat are shown as A, B, and C?

A. Well, sir, stripping lines depend usually on the type of pumps that you have. This ship here, as I understand, and in fact I seen with my own eyes, is equipped with centrifugal pumps. They are not a good pump for stripping. So, in addition to their main suction lines, they put in a stripping line throughout the whole ship, which is a smaller line, as you will notice.

Q. Isn't the stripping line for the purpose of sucking out residue in the bottom of the tank that wouldn't be pumped out by the main line?

The Court: It is the same principle as milking a cow?

The Witness: It is a different type of pump.

The Court: That is a pump to get the residue and milk her dry?

Q. By Mr. Hall: They can't do it with a milking machine, so they do it by hand? A. Yes.

Q. Now, where the line A will go through the wall of the tank, about how far above the bottom of the tank will that line pass through the wall of the tank?

A. That varies, sir.

Q. I am speaking now of this particular ship.

A. Well, it would only be a guess because I have never been on one of these ships, but I would guess—

The Court: Let us not have any guesswork, then.  
[99]

Q. By Mr. Hall: These stripping lines and these suction lines marked A, B, and C, however, are all on the bottom of the tanks, are they not?

A. No, sir, not exactly on the bottom. They run above the floors, what we call the floors. It depends on



(Testimony of L. Simonsen)

the construction of the ship. This ship is an Edgerwald design and has long floors which run fore and aft. This suction line, as I understand it, would probably be six or eight feet, and then this branch suction would run from there to the individual compartments.

Q. Designated as D?

A. As I understand it, this main line goes fore and aft maybe six or eight feet above the bottom of the tank proper. Then, you have your athwartship branch suction that goes into the athwartship compartments with drop lines and a stool that goes down within an inch of the bottom of the tank located fairly close, in fact as close as possible, to the after bulkhead in each compartment in order to get as much product out of the tank as possible.

The Court: Without the use of or having to use the stripper line?

The Witness: Well, that is right, yes, sir.

The Court: May I ask a question?

We are talking about what you call this model flange over here?

Mr. Hall: A spectacle flange. [100]

The Court: A spectacle flange. That is used for the purpose of shutting one tank off from the other?

The Witness: That is right.

The Court: And the only time they can change those is when the vessel is empty?

The Witness: Yes, sir, down in the hold.

The Court: Down in the gas tank?

The Witness: Yes.

Q. By Mr. Hall: Now, Mr. Simonsen, when you went down in the engine room of the Egg Harbor—

A. Pardon me, sir. I didn't go down in the engine room.



(Testimony of L. Simonsen)

Q. I mean the pump room of the Egg Harbor on the 24th of April, did you notice whether there were any spectacle flanges with spectacle blanks in them in the cross-overs which are marked here as N and O?

A. I observed that they were provided with spectacle flanges as shown on this plan, but they were installed in the open position. In other words, they had the blind section out so that products could go from one side to the other.

Q. Based on your experience, will you tell us what in your opinion should have been done on board the Egg Harbor to prevent one product from contaminating the other?

A. Well, we start on the suction lines B and C. We will go to the cross-over G. Before we would put, or before I would put unlike products like in tank 6 and tank 3, we [101] provide a definite blind in this cross-over. That is with a spectacle. We would provide a spectacle flange there.

Q. And you would seat it in a closed position so that there would be no chance for oil or products to go from the B line to the C line?

The Court: In other words, is this the flange here?

The Witness: This is the line, sir.

The Court: Where would the spectacle flange be put?

The Witness: We would put it in right here.

The Court: What are these?

The Witness: Manually operated valves, operated with extension rods from the deck.

The Court: I know, but they can be shut off?

The Witness: From the deck, sir, yes, sir.

The Court: So that no oil could pass through?

(Testimony of L. Simonsen)

The Witness: If they are tight.

The Court: If they are tight?

The Witness: Yes, sir.

The Court: It has to be tight or it would leak?

The Witness: Yes.

Q. By Mr. Hall: Then, in order to make the cross-over which is marked G safe, as I understand you, you would install a spectacle blank in the pipe G between the two valves. Is that correct?

A. Yes, sir, and fit it in a closed position, install it in a closed position. [102]

Q. To do that you would have, there being no flanges for the reception of a blank position, you would have to take out a piece of pipe, wouldn't you, and make it adaptable for the blank in the spectacle?

The Court: You would have to do some plumbing?

The Witness: You would have to do some plumbing, yes, but looking at this manifold right here, the way it is set up, it looks like you might put a blind in there without taking out any pipe. In other words, you could change the bolt holes a little bit to change the blind.

The Court: As I understand your testimony, it is your opinion that these valves are insufficient to properly block off one tank from the other and the spectacle flange should be inserted there?

The Witness: You are absolutely correct, sir.

The Court: And on the other hand, if these valves are working properly they would serve the same purpose, would they not? There is a double check? In other words, there are two valves there, are there not?

The Witness: Yes, sir.

(Testimony of L. Simonsen)

The Court: And that would act as a double protection? You would not only rely on one valve, but under your construction, you could rely on two valves?

The Witness: That is right, if they are tight.

The Court: Well, if the spectacle is not tight, you are in trouble, too, aren't you? [103]

The Witness: Well, it would have to go through metal, sir.

The Court: I know, but if these are tight, it has to go through metal too?

The Witness: That is right.

The Court: So, is is your opinion that the construction of the vessel is such that it would be unsafe for the carrying of two grades of petroleum products?

The Witness: Yes, sir, with that setup, yes, sir. Unlike products, you see, like gas here and diesel over here.

The Court: Yes.

Q. By Mr. Hall: Now, will you explain why, from your experience, you consider it unsafe to handle different products relying simply upon those two valves?

A. Dirt gets under the seats. They won't seat properly. The threads wouldn't bear on the valve. You may put a wrench on it and put all the leverage two men could put on it, and you think it is closed, but these, you understand, sir, are down in the tank. They are in the products. You have no lubrication and these valves work quite hard. So, for that reason anything might get under them.

You might test those valves today and load through them tomorrow and a spring from your pump or a spring from any debris might get underneath those valves and



(Testimony of L. Simonsen)

they could not be closed tightly. You cannot rely on valves.

Q. Now, Mr. Simonsen, I call your attention to the fact [104] that in the cross-overs L and M, for example, it is shown on this chart that those cross-overs are equipped with spectacle flanges. Is there any greater danger from contamination through cross-overs L and M than through cross-overs G and H? A. No, sir.

Q. So that I understand you correctly, if each one of cross-overs L and M are equipped with spectacle flanges, cross-overs G and H should be so equipped?

A. Your deduction is definitely correct.

Q. What else would you have done besides installing spectacle flanges in the cross-over G?

The Court: You wouldn't have changed the name of the ship, would you?

The Witness: No, sir. We would also have installed spectacles in the cross-over between lines A and B.

Q. By Mr. Hall: That is the cross-over marked H?

A. Yes, H.

Q. What else would you have done?

A. Then, we also would have set the spectacles in the cross-overs M and L in a closed position, spectacles N and O in the cross-overs in a closed position.

The Court: Which ones were found open, N and L?

The Witness: Yes, sir.

Mr. Hall: I might say, your Honor, that the deposition of the master will show that they were not using any of the closed positions on these spectacles anywhere on the vessel. [105] Everything was open.

The Court: I see. Where are those open spectacles?

The Witness: I observed O and N to be open.



(Testimony of L. Simonsen)

Mr. Hall: The master says they were all open.

The Court: All right.

Q. By Mr. Hall: What is a hydrostatic test?

A. A test of water on new construction or any new work done in a pipe line.

The Court: At this time, we will take a short recess.

(Short recess.)

The Court: I would like to ask a couple of questions.

These flanges here, O and N, were those the flanges that you said you found open?

The Witness: Between N and O. The cross-over here on O, and the cross-over here on N.

The Court: These two lines here marked 1 and 2, just for our information, these are the flanges, are they not?

The Witness: The spectacles, yes, sir.

The Court: Or spectacles?

The Witness: Yes, sir.

Mr. Hall: I can mark this O-1.

The Court: Now, those were the two flanges that you found open?

The Witness: Yes, sir.

The Court: Now what effect would that have in the pumping of oil, in pumping the cargo out, with having those open? [106]

The Witness: The point is this, sir—

The Court: In other words, would the effect of having those open cause a commingling in the pumping out?

The Witness: If these valves were not tight?

The Court: If the valves O and N are not tight, then that would cause—

The Witness: The intermingling, yes, sir.

(Testimony of L. Simonsen)

The Court: Then, if those valves were tight, it wouldn't cause the intermingling?

The Witness: No, sir, if they were tight.

Q. By Mr. Hall: When you speak of the spectacle flanges in the closed position, you mean, do you not, with the blank piece of pipe completely blocking the pipe?

A. Yes, sir.

Q. Would you proceed with your description of what is done in the case of a hydrostatic test?

Mr. Mack: Do you want to offer this exhibit in the case?

Mr. Hall: Yes.

The Court: I think it should go in evidence as explanatory of the witness' testimony.

Mr. Hall: Very well. I will ask that the model which is marked Exhibit 10 for identification be received in evidence.

The Court: It may be received.

(The model referred to was marked as Libelant's Exhibit No. 10, and was received in evidence.)

Q. By Mr. Hall: Would you proceed with your description [107] of what is done, briefly now, when a hydrostatic test of cargo lines is made?

A. As I started out to say, on all new installations, any changes in pipe lines or periodic overhauls of any kind, before a ship is put back into commission, we make a hydrostatic test of all lines, suction lines, discharge lines, by-pass lines, cross-overs, stripping lines, et cetera.

Q. What is the purpose of that test?

A. To determine whether there are any leaks.

Q. You mean by leaks, leaks in the valves and cross-overs?

(Testimony of L. Simonsen)

A. Yes, and expansion joints or leaks in the line any place, sir.

Q. Then, if I understand you correctly, water is pumped in the line and more pressure is forced against a closed valve. Is that what is done in this test?

A. That is right, sir. Normally the suction lines are tested to 50 pounds. I mean all these lines, all these lines suction to the pump. The discharge lines we test to 125 pounds.

The procedure, for instance, on this line would be to fill the whole line to the very top, at the very top of the manifold of the discharge header; place in a 50-pound test on the line to give all the suction branches, and we would start in, say, at No. 1 tank, and go right down the line on all our blocks, master valves, and so forth. [108]

When that is determined tight, then we shut off the loading drops and test the discharge side down to the pumps at 125 pounds, and all of this is proved tight before the vessel is permitted to load a cargo.

Q. Well, now, I want you to assume these facts, which I believe will have a basis in the evidence in this case. Assume that this vessel, the Egg Harbor, was delivered by the buildings on the 10th of April, 1943; that thereupon, the vessel was loaded with water ballast and proceeded from Portland, Oregon, to San Pedro, California; that it took on at San Pedro, California, a cargo of diesel in tanks 5, 6, 7 and 8, and then proceeded to El Segundo and took on a cargo of gasoline, which was placed in tanks 2, 3, 4 and 9; that cargo of gasoline and that cargo of diesel being the cargo involved in this case.

My question to you now is this, Mr. Simonsen. Would you in the case of that vessel before that cargo was loaded



(Testimony of L. Simonsen)

at San Pedro and El Segundo, make one of these hydrostatic tests irrespective of what tests may have been made before the vessel left the hands of the builders on April 10th?

A. The test that I would definitely make if I would ever load that kind of a cargo in this ship at that time would be before loading to test the valve in the cross-overs. My purpose in that would be to isolate, definitely isolate line C, for instance, so that there would be no possible chance for any contamination into line B through this cross-over. [109]

They have a very bad situation—

Q. Would you also test in the same way the other cross-over from A to B?

A. That is what I was coming to now. They have got a very bad situation here, the way this cargo is loaded. I would also put a test on the cross-over at H between A and B to determine it tight. I wouldn't like to make the load, though, sir. I wouldn't like to make that kind of a load.

Q. Then, if I understand you correctly up to the present time, you would make a hydrostatic test of the cross-over which is indicated in this chart as H and also a hydrostatic test of the valve in the cross-over on G?

A. Yes.

Q. Is that right?            A. Yes.

The Court: Do I understand that before each loading of a tanker it is good practice to make those tests?

The Witness: Well, I will tell you, sir, as I mentioned before—

The Court: You can answer that. Is that common practice? Is it good practice?



(Testimony of L. Simonsen)

The Witness: It is good practice. It would be naturally good practice and we wouldn't do it any other way if we had this kind of a setup in our manifolding. We wouldn't load this kind of a cargo without spectacles in there, sir.

The Court: So far as the valves are concerned, if they [110] were not tight, or if somebody manipulated them, that would cause the intermingling?

The Witness: Yes, sir.

The Court: In other words, as I understand your testimony you, of course, do not approve of this method of shutting off one tank from the other?

The Witness: Definitely not, sir.

The Court: And in the event of using this form of valve, you would test those valves each time before loading?

The Witness: Yes, sir, if we were going to put a different product on each side, sir.

Mr. Hall: That is all my direct examination of this witness, if the court please.

I have in the court room Mr. Dobler, who is connected with the Texas Company, a marine superintendent. He has a tanker under repair that he has to watch, and I would greatly appreciate it if this witness might be withdrawn and I might put Mr. Dobler on. I don't think it would take very long.

The Court: That is all right. Is it satisfactory with you?

Mr. Mack: That is satisfactory with me, your Honor.

(Witness temporarily excused.) [111]

## DANIEL DOBLER,

called as a witness by and on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Daniel Dobler.

## Direct Examination

By Mr. Hall:

Q. What is your present position, Mr. Dobler?

A. Superintendent of marine operations for the Texas Company of the Pacific Coast.

Q. Your headquarters are in Wilmington, California?

A. Yes.

Q. How long have you been with the Texas Company?

A. Almost 18 years.

Q. What are your duties as marine superintendent with that company? What have they been?

A. To supervise the loading of ships, the repairing of ships, manning and in general supervision of all activities.

Q. You had charge of the loading and discharging of tankers? A. Yes, sir, I do.

Q. You also had charge of the repair of tankers?

A. Yes, sir, I do.

Q. You also have had charge of the arrangement of separate cargoes in the same tanker?

A. Yes, sir, I do. [112]

Q. How many tankers have you had under your supervision as belonging to the Texas Company, for example, of late years?

A. Well, it averaged about six.

Q. Now, I show you Libelant's Exhibit 9 in this case, which is a plat showing the cargo piping in a so-called

(Testimony of Daniel Dobler)

T-2 tanker, and I want you to assume that this tanker was carrying gasoline in tanks 2, 3, 4, and 9, and that it was carrying diesel furnace oil in tanks 5, 6, 7 and 8.

My question to you now, is this: What would you have done, or what in your opinion should have been done, basing your opinion upon your experience, to prevent a commingling of the products in the tanker?

A. Well, I would always put in the blind joints to insure that there would be no contamination of cargo. That is a standing order in our company.

Q. By the words "blind joints," do you mean the blind part of the inside of the spectacle as illustrated in Libellant's Exhibit 10?

A. Yes, sir.

Q. Go ahead. Where would you put in those spectacle flanges?

A. I would do that in the pump room.

Q. You would do that in the pump room.

A. Yes, sir.

Q. In the cross-overs in the pump room? [113]

A. Yes, sir, in the cross-overs in the pump room.

Q. You mean by that the cross-overs which are marked on this plat L and M, and O and N?

A. That is right, yes, sir.

The Court: Would that prevent commingling by putting them in those places under that piping system?

The Witness: Yes, that would.

Q. By Mr. Hall: I call your attention to the fact that there is a cross-over between cargo lines at H and another cross-over at G. Would you put in blank spectacles in those cross-overs?

A. I would feel safer with them in.

The Court: Would you say that is good practice?

The Witness: That is positive practice.



(Testimony of Daniel Dobler)

The Court: Why?

The Witness: Well, you are doubly sure then that in the event either one of those valves would leak, why, you would still have no contamination.

The Court: Both of them would have to leak before there would be any contamination?

The Witness: There might be a possibility that there might be a foreign object under this line that may swerve this valve or this one, or both.

The Court: It has to swerve? Something would have to go wrong with both valves in order to cause a comingling?

The Witness: That is true. [114]

Q. By Mr. Hall: In your experience, Mr. Dobler, have you known of instances where a foreign object prevented the tight closing of those valves?

A. Yes, that has been my experience.

Mr. Hall: Take the witness.

#### Cross-Examination

By Mr. Mack:

Q. Mr. Dobler, did I understand you to say it was positive practice to put in spectacles way down in the bottom of the ship there in what they call the No. 5 cross-over and No. 7 cross-over?

A. I would do it to protect myself on that.

Q. Now, the No. 5 cross-over, as I understand it, is marked G on this plat here, Libellant's Exhibit 9, and the No. 7 cross-over is marked H. Is that right?

A. Yes.

Q. Well, now, just to get a picture of those things, the actual valves themselves are way down in the ship, aren't they, Mr. Dobler, way down in the tanks?



(Testimony of Daniel Dobler)

A. They are.

Q. Are you familiar with a Swan Island tanker as to the depth of the tanks?

A. Well, I can't give you the exact depth. I know they are deep.

Q. It is somewhere around 38 feet?

A. Somewhere around there, I should judge. [115]

Q. Now, even though the vessel was constructed that way and delivered after tests, you would put in spectacles in the 5 and 7 cross-overs?

A. I would put the spectacles in the pump room as required to isolate the cargo.

Q. Well, we are not talking about the pump room right now. We are talking about the No. 5 and 7 cross-overs in the bottom of the ship.

A. Well, in this case, I would depend on these two valves here, although I would feel better with the joint in the line.

Q. But isn't it customary and quite usual as a matter of fact, to rely on straight cross-overs Nos. 5 and 7 without any spectacles?

A. Some do, yes.

Q. For instance, don't you have a tanker called the "Shenandoah"?

A. Yes, sir.

Q. Did you outfit that tanker with spectacles down in Nos. 5 and 7 cross-overs?

A. We isolate those lines from the upper deck.

Q. But that is via the pump room, isn't it?

A. In the pump room, yes.

Q. And you rely on the valves, for instance, in the Shenandoah so far as the No. 5 and No. 7 cross-overs are concerned for carrying different grades of cargo?

[116]

(Testimony of Daniel Dobler)

A. If it is dissimilar cargo like diesel and gasoline, we blind them off. We don't depend on the valves.

Q. Have those been changed by you to be able to blind them off?

A. Well, they always have been arranged after that manner.

Mr. Hall: Pardon me, Mr. Mack. You mean blind off the spectacle device?

Mr. Mack: Yes.

The Witness: Pardon me.

Q. By Mr. Mack: On the Shenandoah, for instance, do you have the spectacle arrangement in the Nos. 5 and 7 cross-overs in the bottom of the ship?

A. No. That is all on the upper deck.

Q. That is handled by wheel valves, isn't it?

A. No. We take out a 12-inch nipple on deck and blind-off both those pipe connections.

Q. But you don't do anything to the valve down below?

A. Well, all the valves are in the pump room anyhow.

Q. The point is the Shendandoah is a lot different type of tanker from the Swan Island tankers?

A. Absolutely different.

Q. I see.

The Court: But anyway, you do it from the deck? It has the same effect as using one of these spectacles?

The Witness: Precisely the same. [117]

The Court: Except that you have a different method of doing it?

The Witness: The only thing, we take out a 12-inch section of line and then blank each flange that completely isolates that line from the general loading headers.

(Testimony of Daniel Dobler)

Q. By Mr. Mack: But that is up on top, and not down in the ship? A. That is up on deck.

The Court: So that it has the same effect as if you blinded off these—

The Witness: As if these in the pump room were blinded off here. With the Shenandoah, all her pipe lines are on deck, and all suction valves for each tanker are in the pump room.

Q. By Mr. Mack: So that you can get at them?

A. Yes, we can get at them.

Q. And it would not be unusual in this type of tanker, would it, to rely on the Nos. 5 and 7 cross-over valves completely?

A. Well, in most cases most of the operators, I presume, would.

The Court: Is that good practice or bad practice, in your opinion?

The Witness: Well, there is always the danger of contamination, even with a double valve.

Q. By Mr. Mack: Now, let me ask you this, Mr. Dobler. [118] If, and we will assume for the sake of illustration that you blanked off, you went down in the bottom of the ship and went to a lot of trouble and work and fixed up Nos. 5 and 7 cross-overs so that you could blank them off, would you not then sacrifice a certain amount of maneuverability of your cargo?

A. Will you repeat that once again, please?

Q. Yes. Let us suppose, for instance, that you went to the trouble and time and expense of going down in the bottom of the ship and doing whatever was necessary to put spectacles in the No. 5 cross-over marked G, and the No. 7 cross-over marked H, and you had those set with a

(Testimony of Daniel Dobler)

cargo. Then, would you not sacrifice maneuverability of the cargo and that sort of thing?

A. Well, once you had them blanked off and you were going to pump out those particular cargoes in a certain out port, what difference would it make?

Q. Well, let me ask you—

The Court: It would make it difficult to shift the cargo.

Mr. Mack: That is one point.

The Witness: Well, you wouldn't shift the cargo. If you had diesel there, you wouldn't shift it back into the gasoline.

Q. By Mr. Mack: Yes, but from port wing to star-board wing, or from one center tank to another wing tank, you [119] couldn't do it, could you?

A. Well, you wouldn't do any shifting along that line. You would leave the cargo in there until you pumped it out.

Q. Well, what I have in mind is that sometimes ships are subject to sudden lists and that sort of thing and you have to shift the cargo occasionally.

A. I have never had to shift the cargo.

Q. You haven't run into that? A. No, sir.

Q. Then, supposing that you had your Nos. 5 and 7 blanked off: then, with this line here marked C, if something happened to that line C, you couldn't get your cargo out of tanks 2, 3, 4 and 5, could you, or Nos. 2, 3 and 4?

A. Will you repeat that once again, please?

Q. Well, now, this line here C runs to tanks 1, 2, 3, and 4? A. That is correct.



(Testimony of Daniel Dobler)

Q. If everything was blanked off and this pump broke on line C, you could not get your cargo out of there until the pump was fixed, could you?

A. Possibly not, no.

Q. But, if you did not have Nos. 5 and 7 cross-overs blanked off, could you not pump out tanks 5 and 6 and then run 1, 2, 3, and 4 through that cross-over?

A. Through this cross-over here?

Q. Yes. [120] A. Yes, that could be done.

Q. So that if you blanked off those cross-overs you couldn't do that?

A. This is a line running through here. If this line was broken down, there would be no way of pumping out here only through here (indicating).

Q. Mr. Dobler, just so we are perfectly clear on this, if the No. 5 cross-over were blanked off, and the No. 7 cross-over was blanked off, and the pump on line C broke for tanks 1, 2, 3, and 4, you could not empty those tanks, could you, until the pump was fixed again?

A. That is correct.

Q. But, if you didn't have the cross-overs at 5 and 7 blanked off, you could empty at least tanks 5 and 6 and then, through that line, empty tanks 1, 2, 3, and 4, couldn't you?

A. That is correct. In fact, I would not load a ship the way this one was loaded.

The Court: What do you mean by that answer?

The Witness: I would concentrate the diesel in one end of the ship, and the gasoline away from it.

The Court: Why would you do that?

The Witness: Because there would be less opportunity for contamination.

(Testimony of Daniel Dobler)

Q. By Mr. Mack: Mr. Dobler, is your company carrying different grades of cargo at the present time?

A. We are, four to five different grades. [121]

Q. You are carrying maybe gasoline, diesel oil and crude all in one tanker?

A. No. We will carry stove oil, diesel oil, two grades of gasoline. We also carry or used to carry lubricating oil in connection with kesosene.

Q. That is a common practice among the tanker fraternity, isn't it? A. It is.

Q. Now, if I understand you correctly, if you were loading this cargo, you would load four tanks of diesel and then four tanks of gasoline?

A. I would try to hold the diesel as much together as I possibly could, keeping in mind the trim of the ship.

The Court: Is there any difference in the weight?

The Witness: There is a difference in the weight. Diesel is heavier than gasoline.

Q. By Mr. Mack: So that on this vessel, assuming that the diesel was loaded in tanks 5, 6, 7 and 8, that is pretty much along the middle of the ship, isn't it?

A. That is the center of the ship.

Q. So, you have your heavier liquid all towards the center? A. (No response.)

The Court: That is true, isn't it?

The Witness: Yes, that is true.

Q. By Mr. Mack: Then, wouldn't you say this vessel [122] was loaded properly?

A. Well, that would be in the minds of some masters, yes, it would be loaded properly, but we try to keep the diesel as far aft as we possibly can toward the pump room or adjacent to the pump room to avoid contamination as much as we possibly can.

(Testimony of Daniel Dobler)

The Court: What is the danger? Is there much danger in these cargoes of contamination? Is that something you are constantly on the lookout for?

The Witness: All the time. On every cargo composed of two or three commodities, we are very watchful on the contamination. Samples are taken and checked after loading, and they are checked before discharging.

The Court: Well, in loading a vessel of this type, would you make any test to ascertain whether or not the piping was secure?

The Witness: Were I to assume charge of this vessel, presuming she is a new vessel, to satisfy myself, I would apply 100-pound tests on all the line valves and whatnot to satisfy myself that the lines were tight and that the valves were tight.

The Court: Before loading?

The Witness: Before loading, yes, sir.

The Court: Do you know whether that is a practice in the fraternity, as I believe it is called, the tanker fraternity? [123]

The Witness: Well, I have handled a lot of it myself.

The Court: You don't know whether anybody else has or not?

The Witness: Yes. It is common practice in the oil group to test their pipe lines every so often, possibly every trip, if they have doubts.

The Court: Well, you would expect a new ship to be tight, wouldn't you?

The Witness: Yes, you would. In line with good workmanship everything should be tight, but there is that possibility that rags may have been left in the line, and there may have been bolts left in the line, and while they



(Testimony of Daniel Dobler)

may lie dormant in one position, they might also move in another and possibly come under a valve, or a bolt may shift under the valve. That has been common experience with myself.

The Court: Do you test any different on a new ship than on one that has been in service? In other words, assuming your ship was a new ship, as you have assumed, you say you would test it under 100-pound pressure. Would you be any more careful in your testing for a new ship than you would one that had been in the service for awhile?

The Witness: Yes. I can remember of one new ship that came out of the builder's yard, people that were famed for their workmanship, and when it arrived, all the valves had to be taken out and remachined to be tight.

Q. By Mr. Mack: Mr. Dobler, if you assume that the [124] particular ship involved here is loaded with diesel at San Pedro and then went around to El Segundo to pick up gasoline, would you say that the ship was properly trimmed, having the diesel in the tanks 5, 6, 7 and 8?

A. Well, it would give her more of a level trim.

Q. And if it were the fact, Mr. Dobler, that before loading any petroleum products whatever all lines in this particular ship were subjected to 125-pound water test and there were no leaks whatever, would you say that the vessel was subject to being loaded?

A. Well, now, where would you make that test, in the shipyard or just before she started to load?

Q. Assume that the vessel made a trip brand-new in ballast and while at sea, just before coming into port, water tests were made on all cargo lines and pipe lines



(Testimony of Daniel Dobler)

at 125-pound pressure, and there were no leaks. Would you say that was good practice and that it would be in good order to load the ship?

The Court: Without further tests?

Q. By Mr. Mack: Without further tests?

A. Speaking of present day crews, I certainly would like to see the test myself.

Q. Well, we assume that you don't have to see it. You are assuming it was done.

A. Well, in that case I would have to take the captain's and the mate's remarks that it was bona fide and [125] the lines were tight.

The Court: How could they determine that they were tight if the tanks were loaded with ballast?

The Witness: Well, you would test the lines when the ship was empty, or, you could still have your ballast in certain tanks and test through the empty tanks, and at the time you pump out, you could test the lines in the remainder of the tanks.

Mr. Mack: I think the fact is, if the court please, they pump all the ballast except one tank out and make the water test, and then make the last water test in the final tank when they pump it out. That will show from Captain Olsen's deposition.

#### Re-Direct Examination

By Mr. Hall:

Q. You were asked, Mr. Dobler, if the cross-over G were blanked off, whether it would be possible to remove the cargo from tanks 2, 3 and 4 if the pump pertaining to line C broke, and I think you said it would not be.

A. That is presuming it broke in here?

(Testimony of Daniel Dobler)

Q. No. A. The pump broke down?

Q. Yes. Wasn't that the question? A. Yes.

Q. And you said you could not remove—

A. Well, you can pump through this line. [126]

Q. Wouldn't it be entirely possible?

A. You could pump through this line here.

Q. Well, to get it in the record, assuming that that pump pertaining to line C broke down, and you had permanently blanked cross-over at G, wouldn't it be entirely possible to remove the contents of tanks 2, 3 and 4 through the cross-over M by means of the pump pertaining to line B? A. That could be done, yes, sir.

Q. Now, if the vessel should load four tanks of diesel at San Pedro, wherever that diesel was accommodated it would be perfectly possible, would it not, to put water ballast in the remaining tanks for the purpose of the voyage up to El Segundo?

A. It could be done, yes, sir.

The Court: As I understand it, the way you suggest loading is to have the diesel tanks in one group, and the gasoline tanks in another group, as a precautionary measure?

The Witness: Yes, sir. I can illustrate, if the court may allow me, where we load a ship at our terminal where the master insists on loading the underneath tanks with gasoline and the other tanks with kerosene. For instance, No. 1 with gasoline, No. 2 with kerosene, No. 3 with gasoline, No. 4 with kerosene, and so on until it is completed.

We proposed to him that he load the kerosene in one end of the ship with a certain amount forward in his smaller tanks, and he disagreed with us and the result was

(Testimony of Daniel Dobler)

[127] contamination of the entire cargo by such manner of loading.

The Court: Well, how was it contaminated?

The Witness: Well, it was partially contaminated. It was contaminated through the suction lines as well as through the vent lines.

Mr. Mack: Was that a Swan Island tanker?

The Witness: No, sir, it was a foreign tanker.

Q. By Mr. Hall: Have you been advised by the War Shipping Administration, Mr. Dobler, that spectacle flanges were recommended in the case of tankers carrying different products?

A. Yes, sir. Here is a communication from my New York office signed by Mr. Buchanan, our general marine manager, calling attention to that.

Mr. Mack: That is dated, though, isn't it, December 14, 1944? That document you have just referred to, Mr. Dobler, is dated December 14, 1944?

The Court: It will speak for itself, will it not?

Mr. Mack: This happened back in April of 1943.

The Court: It may indicate they are finally catching up with themselves. They probably have had some other trouble like this. I don't know why it is, with all the shipments of oil where they must have had any amount of commingling, that the law books are practically devoid of cases involving a situation such as we have here. At least we haven't been able to find any. [128]

Mr. Hall: If the court please, I offer this document which the witness has produced with reference to spectacle flanges.



(Testimony of Daniel Dobler)

The Court: Any objection?

Mr. Mack: Yes, on the ground it is remote and immaterial.

The Court: Well, I don't see where a letter from his general manager to him would be admissible unless it is consented to.

Mr. Hall: Well, if the court please, I am not particular about the letter, but the letter attaches and transmits to Mr. Dobler a War Shipping Administration circular No. 27. It is called "Tanker Operations Circular No. 27." It is put out by the Tanker Operations Division of the War Shipping Administration. I think it would be something the court could take judicial notice of.

The Court: We will mark it for identification in this case.

Mr. Hall: Then, Mr. Mack, if you have no objection, I will take just the circular and mark that.

Mr. Mack: Is that War Shipping Administration Circular No. 27?

Mr. Hall: Yes.

The Court: Any objection to that?

Mr. Mack: I will object on the same ground that it is remote and immaterial, being dated December 14, 1944.

The Court: It may be marked for identification.  
[129]

(The document referred to was marked as Libelant's Exhibit No. 11, for identification.)

Mr. Hall: That is all, Mr. Dobler.

(Witness excused.)



L. SIMONSEN

resumed the stand as a witness by and on behalf of the Libelant, and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

By Mr. Mack:

Q. Mr. Simonsen, I believe that you and Mr. Kilbourn went on board the Egg Harbor around 5:00 or 5:30 in the evening of April 23, 1943. Is that right?

A. Yes, sir.

Q. When you were there, you talked to the mate on watch. Is that right?

A. That is right, sir.

Q. Was he the second mate, do you know?

A. He was the second mate, sir.

Q. And it is customary, is it not, in fact it is practice that there be a mate on watch at all times?

A. That is right.

Q. And the mates take turns on the watches, do they not?

A. That is right, sir. They stand watch and watch.

Q. So that when the second mate is on watch, he is in [130] charge of the ship?

A. That is right, sir.

Q. And it is quite customary for the captain or other officers to be away or on other business as long as there is one of the officers on watch. Is that right?

A. That is practice, sir.

Q. Now, did you get the second mate's name, or do you recall it?

A. I do not, sir.

Q. You had some discussion with him, I believe you said.

A. Yes, sir.

Q. What was that conversation?

A. The second mate informed us that he didn't know anything about the loading of the ship, the operation of

(Testimony of L. Simonsen)

the valves, or he didn't know anything about manifolds. He was not a tanker man. He led us to believe, in fact from his conversation I could see he was not a tanker man.

Q. Well, did he tell you in so many words "Mr. Simonsen, I am not a tanker man," or is that something you assumed?

A. I don't think he told me in so many words, but he said he didn't know the pumping arrangement, the loading arrangement or the pipe lines or the valve seats.

Q. Now, at that time, the pumping was shut down, was it?      A. Yes, sir. [131]

Q. And discharging was not commenced until Mr. Hicks had returned, was it?

A. I was not there when discharging commenced the second time, but that is what I understand.

Q. Now, you also talked to the assistant pump man?

A. That is right.

Q. Was that the same afternoon or when?

A. It was the same afternoon, the same evening rather, when we went on board.

Q. Right after you talked to the second mate?

A. That is right, sir, right after we talked to the second mate we talked to the pump man.

Q. Where did that take place?

A. After the midship house.

Q. Was anybody there except you and Mr. Kilbourn?

A. And the second mate.

Q. The second mate?

A. Yes, sir, and the assistant pump man.

Q. What did the assistant pump man say, if anything?

A. The assistant pump man—we asked him about the valve seatings and he said he knew nothing about them.

(Testimony of L. Simonsen)

The valves were all set, according to him, by the pump man before he left. He told him that there was nothing for him to worry about so far as the cargo was concerned, meaning the cargo itself in the tanks or the valves. His main job was to keep those pumps going, watch the pumps, watch the pressures and [132] so forth. He said he was told he would have nothing to worry about so far as discharging was concerned.

Q. Mr. Simonsen, did you have anything to do with these tests of the samples that have been related by Mr. Kilbourn? A. Not a thing, sir.

Q. You were engaged in other business, were you not, during that time?

A. I was in my own work, yes, sir.

Q. Have you ever sailed on tankers yourself?

A. Yes, sir.

Q. What licenses do you hold in the Marine?

A. I hold an unlimited chief engineer's license.

Q. When did you last sail on tankers?

A. I last sailed on a tanker as a licensed officer about 1920.

Q. That was in the early days of the tankers?

A. Tankers haven't changed any, sir.

Q. Now, this Egg Harbor is what is practically known as a Swan Island tanker, is it not? A. Yes, sir.

Q. They first started to produce those several years ago, did they not? A. That type somewhat, yes, sir.

Q. That is one of the newer types of tankers that have been evolved? [133]

A. The hull construction, yes, sir. The pipe line construction is not new.



(Testimony of L. Simonsen)

Q. Well, by that you mean that all tankers basically have stripping lines and suction lines and that sort of thing?

A. Not necessarily all stripping lines, no sir. Some of those do not have stripping lines. They use the main lines for stripping.

Q. Now, as I understand it, Mr. Simonsen, if you had been running the show here, so to speak, so far as the Egg Harbor was concerned, you would have set spectacle blanks in cross-overs designated as G and H on this plat?

A. Yes, sir. I would have provided a spectacle or closed spectacle here on cross-over G and one here on H.

Now, as I said before, I would never load the ship this way, sir. I would not load the ship this way.

Q. Well, G is what is known as a No. 5 cross-over?

A. Yes.

Q. And H is known as a No. 7 cross-over?

A. Yes, sir.

Q. Now, when you say you would never load the ship that way, what do you mean by that, sir?

A. It is not safe. It is not safe to load gasoline and any other uncommon product in adjacent tanks using the same pipe lines without a definite spectacle in there. It definitely isn't safe.

In the first place, you are relying on human nature and [134] the human element, and you are relying on your valves being tight, and you don't see them. They are down usually in 302 feet of oil, and you are depending on those seats being o. k. and not having any interference whatsoever, and it is not safe. It is definitely not safe to load gasoline on one side of the valve and diesel oil on the other side of a valve.



(Testimony of L. Simonsen)

Q. Well, isn't it reasonable in your opinion, Mr. Simonsen, to install gate valves and a pair of them for cross-overs there?

A. Not between products, not between unlike products, no sir.

Q. The reason, as I understand it, that you install two valves within a short distance of each other instead of one, is that if one may not work you have always got the other that will?

A. That is very true. We have that setup on like products. If we have two grades of diesel where a little contamination doesn't make a great deal of difference, then we rely on the double block, but we do not rely on the double block between gasoline and diesel oil because it is not safe.

The Court: What do you base that statement on?

The Witness: The unknown quality, sir, of the valve; the human element, and then the possibility of there being something under the valve.

The Court: I know, but has experience taught you that there is an element of risk of contamination wherever you [135] have a cargo of two grades of oil?

The Witness: Definitely so. Where you have got valves, definitely. We have had it happen so many times. Do you know, sir, that for 20 years we haven't loaded gasoline under my jurisdiction for over 20 years on one side and diesel on the other without a definite block in there.

Q. By Mr. Mack: Have you been using Swan Island tankers?

A. No, sir. I have not been using Swan Island tankers, but a pipe line is a pipe line and it doesn't make any

(Testimony of L. Simonsen)

difference what kind of a tanker it is. It is still a pipe line. It still takes in tanks. We have tankers with practically the same kind of setup as this.

Q. You know, do you, Mr. Simonsen, that this Swan Island tanker was passed by and accepted by the United States Maritime Commission?

A. By the United States Maritime Commission? Well, yes, I assume it was.

Q. And isn't it a fact that there are many tankers, American registered tankers, sailing the seas, that have and rely on cross-over valves down in the bottom?

A. I couldn't answer that, sir. I couldn't answer it at all. I just couldn't believe that anybody would do it.

Q. Well, now, if you were taking delivery of the tanker brand-new with the No. 5 and 7 valves as shown there, cross-overs, before accepting any cargo whatever, would you go down [136] in the bottom and change all that plumbing there and install spectacles?

A. I would go down in the bottom and definitely remove this between the valves here. I would remove that fitting and also this fitting over here. I would remove the valves and blank them because you have got the same flexibility in the pump room. Otherwise, you would be just inviting trouble. You have got the same flexibility in the pump room.

That is just like putting two gates in, one alongside of the other. It is of no use at all, because you can do it all in the pump room where you can see.

Q. You would do that, would you, even in times of stress and war?

A. I would remove them immediately before I would ever load a cargo on the ship. Under no circumstances

(Testimony of L. Simonsen)

would I load this ship with unlike products between this manifolding setup without definitely removing these fittings here and seeing that the valves or anything you put in there are blanked entirely, that those lines are blinded entirely at G and H cross-overs, so that no matter what you do on deck you could not create a contamination through the cross-overs down in the tanks. Definitely I would do that, because you have the same flexibility in the pump room.

Q. Well, now, that would involved some ship work, would it not, shipbuilding?

A. Very little. I could pick a crew and do that. I [137] could rip those things out in no time. I don't think it would involve very much.

Q. It would take a couple of days, wouldn't it?

A. No, sir. Looking at that, I believe you could rip those out, take a half a dozen men and go down there and drop those out in an hour or even less. I haven't seen the ship, but I have seen a lot of these pipe lines, and I would say that wouldn't be very much of a job.

Q. Let me ask you this, then. Assuming that you would blank off No. 5 and 7 cross-overs down in the bottom, there would be a sacrifice of some maneuverability or working of the pipe lines?

A. No, sir, definitely not, because you have the same thing in the pump room.

Q. Well, supposing your pumps broke down on line C and line A, for example, on this plat.

A. All right. We would pump that with a midship pump. We would remove those spectacles and use that midship pump. You have got your cross-overs there just the same, sir.



(Testimony of L. Simonsen)

Mr. Hall: The witness is indicating cross-overs L and M.

The Witness: Those cross-overs answer the same purpose. Cross-overs L and M answer the same purpose as the cross-overs H and G. They are on the same pipe line A. It is just like changing the same gate in the same fence right alongside each other. They are on the same pipe line. So, you can see readily that you can do just as much in the pump room as you [138] can in here.

The Court: Gentlemen, I think we will take a recess until tomorrow morning. We have had a good afternoon of it, but I would like to know, and if it is in the briefs, it had not been made clear to me, the interpretation of 1303 as you interpret it.

It says:

"(1). The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence."

Then it names (a), (b), and (c). Then there is No. (2) reading as follows:

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

A great deal of attention is paid to the attention of whether or not the ship exercised due diligence. Now, under (2) it would appear to me that it places a responsibility upon the ship to properly and carefully discharge the cargo. It is not a subdivision under (1) where due diligence is required.

I am just wondering under what theory we will approach this. Aren't you in the position as the libelant in



this case, as long as it has been stipulated that the cargo was placed uncontaminated, isn't the burden then shifted to the respondent to show that he has properly and carefully loaded [139] and discharged the goods carried?

Mr. Hall: That is our contention, yes, your Honor. The reason for the testimony today is to indicate the possibilities of possible contamination. We don't know what caused it. All we can do is to show that there were these possibilities and leave the burden of explanation to the respondent where we believe under all the authorities it rests and those authorities, I believe, are most of them set out in my printed memorandum.

The Court: Well, we have cross-sectioned that back and forth, so far as that is concerned, but it isn't altogether clear to me, and it seems that at the present time we are taking the approach that the ship exercised due diligence when, under (2) the responsibility is to properly and carefully discharge this oil.

Now, since the oil has been discharged and since it is contaminated, does that immediately shift the burden upon the respondent to show that they have properly and carefully discharged that cargo?

Mr. Hall: I believe that to be the case. The burden rests with the respondent.

The Court: There is one other point that I am thinking about and that I want you to be prepared to argue. I believe Mr. Mack has been asking questions today concerning it, the question in the stipulation about the Charter Party, and that is paragraph 7 relating to the loading and pumping out of the [140] cargo of oil.

Does that limit the liability of the vessel at the end of the vessel's hose?

Mr. Hall: Is your Honor referring to paragraph 7 of the stipulation?

The Court: No, paragraph 7 of the Charter Party.

Mr. Mack: That is our contention. When it gets into that pipe—

The Court: Of course, I don't think there is any question under the law that this whole proceeding, in view of the paramount clause 25 comes under the Carriage of Goods by Sea Act. I think it is 1307, if I am not mistaken.

Now, there is a section here that seems to me would not be in conflict with the Carriage of Goods by Sea Act, and that is No. 7, which would limit the liability of the ship at the point of delivery. I am mentioning that to you gentlemen not because I am going to ask to hear from you on those points, and I make it a practice, as Mr. Mack knows, to let counsel know what I am thinking about so that if I get on the wrong track, why, counsel has an opportunity to straighten me out.

I made mention of those things because I had them in mind. We will take a recess until 10:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 4:30 o'clock p. m., January 30, 1945, an adjournment was taken until 10:00 o'clock a. m., Wednesday, January 31, 1945.) [141]

Los Angeles, California, Wednesday, January 31, 1945.  
10:00 a.m.

The Court: Proceed, gentlemen.

L. SIMONSEN,

resumed the stand as a witness by and on behalf of the libelant, having been previously duly sworn, and was examined and testified further as follows:

Cross-Examination.

(continued.)

Mr. Mack: Miss Reporter, could we have the last question and answer read?

(Record read.)

Q. By Mr. Mack: Now, Mr. Simonsen, with respect to the use of spectacle flanges, if you used those down in the bottom of the ship in the No. 5 and 7 cross-overs as proposed by you, there is a possibility of error with the spectacles too, isn't there, human error in tightening them up and that sort of thing?

A. Yes. I will grant you that there is a possibility of an error, but after we have put the spectacle flanges in, we also test the line to make sure there are no leaks through the gaskets and around the spectacle.

Q. Do they generally test the lines too?

The Court: Will you speak louder, please?

Q. By Mr. Mack: They generally test the lines too with the regular valves, don't they?

A. Yes, that is quite true, but they can be altered. [143] After you have set your valves and tested them, somebody can come along and open them up. You put a blind spectacle in and determine that it is tight, and the human element is out after that.

Mr. Mack: I think that is all.

The Court: May I ask have you had a mixed cargo delivered to you by the Keystone people?

(Testimony of L. Simonsen)

Mr. Hall: Pardon me, your Honor. Before you answer, may I have the question read?

The Court: What's that?

Mr. Hall: I didn't hear it.

(Question by the court read.)

The Witness: I can't answer that, sir, in my position.

The Court: You don't know?

The Witness: No.

The Court: Well, as I understand your testimony, you yourself never were able to ascertain the cause of this intermingling?

The Witness: That is right, sir.

The Court: The Egg Harbor delivered another cargo immediately following this, did they not?

The Witness: I presume so.

The Court: You don't know?

The Witness: I don't know. I don't know of any reason—I mean, I am not familiar with it, sir.

The Court: I thought you were located at Point Wells.  
[144]

The Witness: Yes, sir.

The Court: Did I misread the captain's deposition to the effect that another cargo was delivered from Standard to Point Wells and a second cargo was taken on board at El Segundo and brought back to Point Wells in which there was no difficulty?

The Witness: I am not familiar with it.

The Court: You are not?

The Witness: No.

The Court: That is all I wanted to ask.



(Testimony of L. Simonsen)

Re-Direct Examination

By Mr. Hall:

Q. At any time when you were on the vessel the Egg Harbor on either the 24th or the 25th or the 23rd, did you handle or touch any of the valves or any other equipment on the vessel? A. Absolutely not, sir.

Q. Is it a practice of the Marine Department to instruct its shore personnel not to touch equipment or valves of a vessel? A. Yes, sir.

The Court: In that respect, did you examine the valves so far as they appeared on deck?

The Witness: Only visually. I never touched the valves.

The Court: Did you ascertain whether they were sealed or not? [145]

The Witness: Yes, I did, that is, on deck.

The Court: Were they sealed?

The Witness: Two valves were sealed on deck, yes, sir.

The Court: How about the rest of them?

The Witness: None of the rest were sealed, to my knowledge. I didn't see them.

The Court: You only observed two?

The Witness: That is right, sir.

Q. By Mr. Hall: Now, when you say "sealed," you mean there was a chain connecting the wheels on two of the valve extensions on deck so that the chain was sealed by some device, don't you?

A. That is what I mean, yes. I should like to make myself clear. As I observed them, there was a chain run through the wheels and a lock was used.

(Testimony of L. Simonsen)

The Court: Do you know whether that method would lock the valves in the position that they were in?

The Witness: Yes, sir, unless something unlocked them, that is **right**.

The Court: That method would lock the valves as they were set at the time?

The Witness: As long as they were not disturbed, that is **right**.

Q. By Mr. Hall: That method of sealing would not insure the tight fitting of the valve, would it?

A. You wouldn't know whether the valves were closed [146] or not. Nobody would know.

Mr. Hall: That is all.

The Court: That is all.

(Witness excused.)

Mr. Hall: Mr. Mack, I desire to offer the deposition of Lawrence C. Olsen. May it be stipulated that this deposition is deemed to have been read in evidence?

Mr. Mack: Yes. I will so stipulate.

The Court: That is the captain?

Mr. Hall: Yes.

The Court: I have read the deposition.

Mr. Mack: That will save the time of reading it into the record, and it is agreeable to me.

Mr. Hall: Then, if it is agreeable to the court, may it be introduced in evidence and deemed to have been read?

The Court: Yes, because I have read it.

(The document referred to was marked as Libelant's Exhibit No. 12, and was received in evidence.)

[LIBELANT'S EXHIBIT NO. 12]

[Title of District Court and Cause.]

DEPOSITION OF LAWRENCE C. OLSEN,

taken at Los Angeles, California, on Friday, December 22, 1944, at 11:00 a. m.

Deposition of Lawrence C. Olsen, taken on behalf of the respondents, at 1100 Banks-Huntley Building, 634 South Spring Street, Los Angeles, California, on Friday, December 22, 1944, at 11:00 a. m., before W. L. Heathcote, a Notary Public within and for the County of Los Angeles and the State of California, pursuant to oral stipulation.

Appearances of Counsel:

For Libelant: Lawler, Felix and Hall, by John M. Hall, Esq.

For Respondents: Lillick, Geary, McHose & Adams, by A. F. Mack, Jr., Esq.

Reported by: W. L. Heathcote.

LAWRENCE C. OLSEN,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mack:

Let the record show that the deposition of Captain Lawrence C. Olsen is being taken at this time and place by stipulation of opposing counsel, Mr. John M. Hall, of Lawler, Felix and Hall, proctors for libelant;

That all objections except as to the form of questions are reserved to the time of trial.

(Libelant's Exhibit No. 12)

Mr. Hall: Yes, that is so stipulated.

Mr. Mack: May it also be stipulated, Mr. Hall, in view of the fact that Captain Olsen will only be here for a short time, the reading, signing, sealing, and certification of this deposition may be waived?

Mr. Hall: Yes, I will so stipulate.

Mr. Mack: Thank you.

Q. What is your full name, Captain?

A. Lawrence C. Olsen.

Q. Where is your present address, the address where you live?

A. 1323 Silvius Avenue, San Pedro, California.

Q. What is your occupation?

A. Master mariner.

Q. Captain, do you hold a master's license?

A. I do.

Q. Is that unlimited? A. It is unlimited, yes.

Q. And for how long have you held such a license?

A. Since November 11, 1942.

Q. Captain, are you presently engaged in going to sea?

A. I am.

Q. I will ask you, Captain, if you expect to leave Los Angeles, or the Los Angeles area, shortly on another voyage? A. I do, in three more days.

Q. Do you know where you are going? A. No.

Q. Nor where you will be? A. No.

Q. I will ask you if you have any knowledge or information at the present time as to whether or not you will be in Los Angeles or vicinity around or on January 30, 1945, which is the date probably set for the trial of this case? A. That I do not know.

Q. Captain, how long have you been going to sea?



(Libelant's Exhibit No. 12)

A. Since March 14, 1935.

Q. Have you been following the sea continuously since 1935? A. That is right.

Q. Has your experience as sea captain been confined to any particular type or class of vessels?

A. All tankers. In fact, with the same company.

Q. What is that?

A. It used to be the Pennsylvania Shipping Company, but now it is all incorporated into the Keystone Shipping Company.

Q. Is my understanding correct then, Captain, that since you have been going to sea, your experience has been limited to tankers only? A. That is right.

Q. By whom are you employed at the present time?

A. Well, I guess you would say the United States Government War Shipping Administration, but the Keystone Shipping Company is their general agent.

Mr. Hall: Don't you think that may call for a conclusion of the witness?

Mr. Mack: It may, Mr. Hall.

Q. Captain, I will ask you—

Mr. Hall: We can prove that by the log book, can't we?

Mr. Mack: Well, we won't go into that now.

Q. Captain, let me ask you this: Have you at any time in the past had anything to do with a vessel known as the SS Egg Harbor?

A. Well, I was master of the Egg Harbor from April 1, 1943, until September 28, 1944.

Q. Are you presently serving on the SS Egg Harbor?

A. No, sir.

(Libelant's Exhibit No. 12)

Q. Captain, is the Egg Harbor what is known in the maritime trade as a Swan Island tanker?

A. Yes, called a T-2-S.E. A-1. That is the type of tanker.

Q. Did you take the Egg Harbor out on its maiden voyage? A. Yes, sir.

Q. And, Captain, will you relate for us briefly your experience, if any, with the Egg Harbor up to the time you first sailed on the vessel's maiden voyage?

A. Well, I was transferred from the Bald Butte to the Egg Harbor, which was located at Portland, Oregon.

Q. About when was that?

A. Well, I arrived—I got off the Bald Butte about the 28th of March and I arrived at Portland, Oregon about the 1st day of April, 1943.

Q. And what did you do then, if anything, relative to the Egg Harbor?

A. Well, I went down on board the ship with the company inspectors and watched the work that was going on, and I climbed down the tanks and inspected the tanks and the pipe lines and the valves that took care of the lines, and the piping arrangements.

Q. At that time do you know if the vessel was still in the hands of the builders?

A. At that time the vessel was still in the hands of the builders, yes.

Q. Well, do you know, Captain, approximately when delivery was taken of the vessel from the builders?

A. I think it was on April 10th.

Q. Now at the time you arrived at Portland, Oregon, about April 1st, and first went on board the Egg Har-

(Libelant's Exhibit No. 12)

bor, were there any other officers on the vessel at that time?

A. The chief mate, Mr. Morris, and the second mate, Mr. Danielson.

Q. Did those men stay on the Egg Harbor, to your knowledge, up to the time delivery was taken?

A. That is right. They had their own—that is, they worked from eight o'clock in the morning until about four o'clock in the afternoon; they stayed aboard.

Q. What were they doing as far as you observed?

A. Just learning the general arrangement of the ship.

Q. Did you confer with them at any time about the arrangement of the ship and the cargo piping, and that sort of thing?

A. Well, I asked them how they were getting along with it, whether they were learning anything, if they were satisfied if they were learning about it, and they assured me—

Q. No, we can't have any conversation. All you can say is yes or no to that question.

A. Yes.

Q. Now, Captain, while you were on the vessel during that ten-day period or so before the delivery was taken, was there a trial run conducted?

A. Yes, we had a trial run, but I don't know the exact date.

Q. Was it some time before April 10, or afterwards?

A. Oh, yes, it was about the 7th, I believe. I am not quite certain of that, however.

Q. Were you on the Egg Harbor during its trial run?

A. That is right.

(Libelant's Exhibit No. 12)

Q. Where did you go?

A. We went from Swan Island Shipyard to Astoria and turned around and came back again.

Q. Now did you notice or observe any unusual results of any kind in the trial run; did you yourself notice anything?

A. No, all the tests that the—

Mr. Hall: Just a minute. The question calls for just what you observed, Captain, what you yourself observed, not what somebody else told you.

The Witness: No, I was watching the various tests, the various tests they conducted, like the anchor test and **trying** the fathom meter, and the course finder and the gyro compass. They all worked perfectly.

(Discussion by counsel off the record.)

Mr. Mack: Q. Incidentally, Captain, when you first arrived at Swan Island and went on board the Egg Harbor, where was she at that time?

A. Alongside the outfitting dock.

Q. Now I show you, Captain, this document here, which I have previously shown in its entirety to Mr. Hall, and I will ask you to tell us what that is, please, if you know (handing book to witness).

A. It is the log book of the deck department.

Q. Of the Egg Harbor?

A. Of the Egg Harbor, yes.

Q. In other words, that is what is known as the rough deck log of the Egg Harbor?

A. That is right.

Q. For what period of time?

A. From April 13, 1943, to May 12, 1943.

(Discussion by counsel off the record.)



(Libelant's Exhibit No. 12)

Mr. Mack: I will ask that the book be marked by the reporter for identification as Respondent's Exhibit 1.

(The document was so marked by the reporter.)

Mr. Hall: I will stipulate, Mr. Mack, that these documents which you are now having marked for identification may be retained in your custody until the time of trial so that we both may have access to them.

Mr. Mack: Thank you.

Q. Now will you tell us what this document is, please, Captain (indicating another book).

A. This is the smooth deck log *but* for the Egg Harbor.

Q. For the same period of time?

A. Yes, for the same period of time.

Mr. Mack: Will the reporter please mark this for identification as Respondent's Exhibit 2 for identification.

(The document was so marked by the reporter.)

Q. Now tell us what this is, please, Captain (handing further documents to witness).

A. This is the engineer's rough log book for the Egg Harbor.

Q. For what period of time.

A. For the period of April 12, 1943, to May 31, 1943.

Mr. Mack: I will ask that the reporter mark this for identification as Respondent's Exhibit 3.

(The document was so marked by the reporter.)

Q. Now what is this book, Captain (handing document to witness)?

A. This is the engineer's smooth log book for the Egg Harbor.

Q. For the same period of time?

A. For the Egg Harbor, yes, the same period of time: that is correct.

(Libelant's Exhibit No. 12)

Mr. Mack: I will ask the reporter to mark this for identification as Respondent's Exhibit 4.

(The document was so marked by the reporter.)

Q. Now what is this next document, Captain (handing document to witness)? A. This is the—

Q. When I say document, that represents three sheets of paper fastened together.

A. Yes. This is the engineer's rough abstract of the engineroom log book. Do you want the time?

Q. Yes, if you can tell us from a quick reading of them. A. Well, it goes from—

Q. Just tell us the period covered by the whole three sheets, if you can. A. April 14th to May 14th.

Q. 1943? A. Yes.

Mr. Mack: I will ask that these be marked by the reporter as Respondent's Exhibit 5 for identification.

(The documents were so marked by the reporter.)

Q. Now what are these three sheets here, Captain, the three typewritten sheets (handing documents to witness)? These appear to be a smooth copy.

A. Those are the engineer's smooth copies of the abstract of the engineroom log book.

Q. For the same period of time as the preceding ones which I have just handed to you?

A. Yes, for the same period of time.

Mr. Mack: I shall ask that these be marked by the reporter as Respondent's Exhibit 6, all of the sheets as one exhibit.

(The documents were so marked by the reporter.)

Q. Now, Captain, I don't know whether we will use this paper at all, but as long as you are here I will ask

(Libelant's Exhibit No. 12)

you to tell us what that is (handing document to witness)?

A. This is a copy of the crew list of the Egg Harbor leaving Portland, Oregon.

Q. On the maiden voyage of the ship?

A. On the ship's maiden voyage, yes.

Mr. Mack: I will ask that the list be marked as Respondent's Exhibit 7 for identification.

(The document was so marked by the reporter.)

Q. Now what is this paper, Captain (handing document to witness?)

A. This is the rough copy of the ullages of the cargo loaded at San Pedro and El Segundo and also has the discharging ullages on there, too.

Q. That would be discharging at Point Wells?

A. Yes, at Point Wells.

Q. That was on the maiden voyage?

A. That was on the maiden voyage, yes.

Mr. Mack: I will offer this document as Respondent's Exhibit 8 for identification and ask that it be so marked by the reporter.

(The document was so marked by the reporter.)

Q. What is this next sheet, Captain, the next one here (handing document to witness)?

A. This is a copy of the ullages of the cargo discharged at El Segundo, of the contaminated cargo.

Q. This is from the south bound trip after you had been up to Point Wells with the cargo?

A. That is right. This is the cargo we brought back.

Q. Will you give Mr. Hall the date on that?

Mr. Hall: Yes, what date was the contaminated cargo discharged?



(Libelant's Exhibit No. 12)

The Witness: On May 1st and May 2, 1943.

Mr. Mack: I will ask that the document be marked as Respondent's Exhibit 9 for identification.

(The document was so marked by the reporter.)

Q. Now, Captain, will you tell us, please, when you sailed originally from Swan Island, Portland, Oregon south bound, and you may use any of the logs that you wish, unless you remember it without looking.

(Discussion by counsel off the record.)

A. It was April 13, 1943.

Q. Captain, do you recall what transpired between the time you took delivery of the ship on or about April 10, 1943, and the time you sailed on April 13, 1943?

A. I believe the time was spent in tying up the last minute repairs at the shipyard; and we had to load ship's stores, and then we went to anchor to finish the signing on of the crew. We had a little trouble getting a crew. And then we had to have a fire and boat drill before we sailed. That took place on the morning of the 13th.

Q. Captain, did you sail empty or in ballast?

A. We sailed in ballast.

Q. Will you tell us what that means in plain English to somebody who is not used to the sea?

A. Ballast in a tanker is usually sea water pumped into the various tanks to make it more stable in a sea way. It brings the ship down to a certain draft where she will not pitch and roll too badly.

Q. Now, Captain, on the trips outbound in ballast did you check the cargo piping of the ship at all, or was it checked by anybody under your direction?

A. After we sailed we changed the ballast around a bit in various tanks, and the day of the arrival in San Pe-



(Libelant's Exhibit No. 12)

dro, we pumped out nearly all of the ballast. There was one tank of ballast left to bring us through the nets at the breakwater. So after the ballast was all pumped out except this one tank the first mate and the pump man tested the pipe line.

Mr. Hall: Wait a minute. I shall object to this unless it was something that you yourself observed. Was this something that you observed?

The Witness: Oh, yes.

Mr. Hall: All right.

Mr. Mack: Q. All right, go ahead, Captain.

A. And the first mate and the pump man tested the pipe line and the suction valve by water pressure. By that I mean the closing of the valves and putting a pump pressure against water in the pipe lines.

Q. Do you know how much pressure was applied at that time? A. Yes, 125 pounds.

Q. What was the result as you observed it of that pressure test of the cargo lines?

A. There were no leaks as far as I could tell.

Q. Is it customary, Captain, from your experience in the tanker game to make such a line test or check of cargo pipe lines before taking on cargo?

A. It has been my practice to test all pipe lines and all valves before a new cargo is loaded, and I imagine all tanker men do the same thing.

Q. Now after you made that test you proceeded to loading at San Pedro?

A. I got alongside the dock at San Pedro and we pumped out the rest of the ballast and we had another line test in order to test the tank that had had the ballast in it.

(Libelant's Exhibit No. 12)

Q. What was the result as you observed it of the line test of that particular tank?

A. There were no leaks.

Q. Now after that line test did you then proceed to load cargo at San Pedro?

A. We loaded diesel oil at San Pedro.

Q. And after the diesel oil was loaded did you then proceed to load the gasoline?

A. We went to El Segundo and loaded the gasoline.

Q. Was there a Captain Hogstrom on the vessel during all of the loading operations? A. Yes, he was.

Q. Will you briefly tell us who Captain Hogstrom is?

A. Captain Hogstrom is the port captain for the Keystone Shipping Company at San Pedro.

Q. Now, Captain, before loading was commenced at San Pedro did you personally check the cross-over valves on the vessel? By that I mean the—

A. I watched them being closed and sealed, but I didn't try them myself.

Q. Well, in other words, let me put the question this way: Were you present when any closing or check of the cross-over valves were made before loading operations commenced? A. That is right, I was.

Q. Please tell us what you observed and what was done?

A. I watched the chief mate and the quarter master close the cross-over valve at No. 5 tank, and he closed it tightly, or what appeared to be tightly, with what they call a wheel wrench, because it applied more pressure, and then they chained and sealed the valve.

Q. Was anybody else present with you watching this operation? A. Captain Hogstrom was.

(Libelant's Exhibit No. 12)

Q. And how about No. 7 cross-over?

A. That was closed and sealed the same way.

Q. Now, Captain, after you had loaded the gasoline at El Segundo did you then proceed on the rest of the voyage to Point Wells? A. Yes, we did.

Q. Can you tell us, please—and you can use any of the logs that you wish—when you arrived at Point Wells?

A. We arrived alongside the dock at Point Wells at 5:30 a. m. on April 23, 1943.

Q. Can you tell us, please, what the state of the weather was at the time you arrived there?

A. There was a howling gale blowing just at the time we were tying up and it increased in force after we were alongside, and we couldn't start pumping cargo until the storm abated.

Q. When did the pumping operations commence; that is, the discharge of the vessel?

A. At 1:50 p. m. on the 23rd.

Q. Captain, when the vessel arrived at Point Wells and before pumping operations were commenced did you personally check or watch being checked the cross-over valves at No. 5 and No. 7?

A. I checked them myself; not the numbers, but I checked the valves to see that the seals were still on them.

Q. Were the seals still on them?

A. The seals were still on them, yes.

Q. Were the seals broken in any way?

A. No, they were still secure.

Q. Were the valves shut?

A. To my knowledge they were, yes, sir.

Q. Captain, were you on the vessel when the pumping operations commenced? A. I was.



(Libelant's Exhibit No. 12)

Q. Did you later receive any report from the dockman of the Standard Oil Company of California about any contamination; I mean by that, you yourself?

A. Not officially. After it all happened and I came back aboard the ship—after I got back aboard the ship I was informed that there was contamination.

Q. You learned when you came back on board ship that there was some contamination?

A. No, they called me up at the hotel.

Q. Had you left the ship after discharge operations had commenced?

A. Oh, yes.

Q. And who was in charge during your absence?

A. The chief mate.

Q. Did you have any discussion afterwards with any men of the Standard Oil Company about any contamination or the testing of any of the products?

Mr. Hall: Just a minute. You can answer that question yes or no, and then counsel will ask you another question.

The Witness: Yes.

Mr. Mack: Q. Will you tell us with whom it was and where and at what time especially, and who was present. You don't have to remember right to the minute, but just generally, whether it was in the evening or in the morning or something like that, and give us the men's names if you can remember them.

A. Well, there was a Mr. Simonson, for one. I can't think of the other man's name.

Mr. Hall: Was it Mr. Kilbourne?

A. Yes, that was the other one. And after I came down to the ship and I saw what took place I went over to the dock office and saw Mr. Simonson and Mr. Kil-



(Libelant's Exhibit No. 12)

bourne, and they asked me various questions about the pipe lines and the valves, and in fact I brought them over the cargo plan and showed them the piping arrangements, and they asked me if I knew what caused the contamination, and I couldn't tell him anything. I didn't know.

Mr. Mack: Q. Did you afterwards take Mr. Kilbourne and Mr. Simonson on the ship?

A. I didn't; Mr. Hicks and Mr. Stevens did.

Q. Was that, to your knowledge, to permit them to check the lines and that sort of thing?

Mr. Hall: Just a moment. That is objected to as calling for a conclusion of the witness. The form of the question is objectionable.

Mr. Mack: Q. Did Mr. Simonson and Mr. Kilbourne go on board the Egg Harbor after this discussion some time? A. That is right, they did.

Q. And were they on board the Egg Harbor for some period of time, to your knowledge?

A. A couple of hours, I guess, checking over the valves and pipe line arrangements.

Q. Did you have any conversation with them after they had been on the Egg Harbor?

A. Oh, yes, surely.

Q. I mean, about this contamination that they referred to? A. Oh, yes.

Q. What did they say to you?

Mr. Hall: Pardon me. Is this a second conversation?

Mr. Mack: Yes.

Mr. Hall: Won't you lay a foundation for it?

Mr. Mack: Yes; all right.

(Discussion by counsel off the record.)

(Libelant's Exhibit No. 12)

The Witness: Well, we had no special appointment. I did go up in the office after two or three hours, maybe.

Mr. Mack: Q. Well, let me ask you this, Captain: After Messrs. Simonson and Kilbourne had been on the Egg Harbor and after you first talked with them did you have any later talk or talks with them about their visit on the vessel? A. Just informal, that was all.

Q. Do you recall what the substance of any of those conversations was on those occasions, as far as the vessel was concerned?

A. Well, it was merely if I had any idea as to what caused the contamination. I related that as far as I knew—

Mr. Hall: Wait just a minute. May I have that answer, please?

(The last answer as far as given by the witness was read by the reporter.)

The Witness: (Continuing) As far I knew the tank valves were properly set and all of the seals were in order, and the ship was properly lined up to discharge cargo. But what caused the contamination I didn't have the least idea. They wanted to know if it was the mate's fault or my fault or the fault of the valve or a leaky tank, and I told them I didn't know. They did create an objection about the spectacle blanks not being turned, and they asked me why we didn't do it, and I didn't know—that is, I don't know what I told them about that now.

Mr. Mack: Q. Were the spectacle blanks set before discharge commenced at Point Wells on this voyage?

A. No.

(Libelant's Exhibit No. 12)

Q. Now, Captain, did Messrs. Simonson and Kilbourne show you any of what they contended was the contaminated cargo? A. No, not to me they didn't.

Q. Did you afterwards sail from Point Wells south bound again?

A. That is right, back to El Segundo.

Q. And did you carry a certain amount of cargo out with you on that occasion?

A. Approximately 45,000 barrels of contaminated diesel oil and gasoline.

Q. When you refer to the expression "contaminated," did you check it yourself, or did the vessel check it, to your knowledge?

A. There was no way of having the vessel checked except by the color of it.

Q. Was it off color, or did you see it?

A. I never even saw any of it.

Q. Did you discharge this contaminated cargo, as we may refer to it, at El Segundo then at the end of your south bound voyage? A. Yes, we did.

Q. And was that at the Standard Oil mooring there?

A. Yes, that is right.

Q. And that was into the Standard Oil Company's lines?

A. That is right.

Q. Captain, were the officers on the Egg Harbor on this maiden voyage, in addition to yourself, regularly licensed men, to your knowledge?

A. Yes, they were all licensed officers.

Q. Do you know whether any of the officers on that maiden voyage had had previous experience with tankers?

A. Three of them had that I know of, the mate, the second mate, and the senior third mate.



(Libelant's Exhibit No. 12)

Mr. Mack: I believe that is all. You may cross-examine.

Recess.

### Cross-Examination

By Mr. Hall:

Q. You had had no experience with tankers before 1935, had you? A. That is right.

Q. Now did you ever have any experience with a tanker having the cargo arrangements that the Egg Harbor had prior to the time you became master of the Egg Harbor? A. No, sir.

Q. Now you have said that you arrived at Portland, Oregon on April 1, 1943; that is correct, is it?

A. That is right, yes.

Q. And did you go immediately to the tanker Egg Harbor? A. I went the same day, yes, sir.

Q. And the tanker, I think you said, was then alongside the outfitting dock? A. That is right.

Q. Now you said that you went on board the ship in company with the inspectors. Did I get your testimony correctly in that regard; is that correct?

A. That is correct, yes.

Q. Now were those inspectors people who were connected with the builders of the vessel?

A. No, sir, connected with the company; they were company inspectors.

Q. You mean by that the Keystone Shipping Company? A. That is right.

Q. And what were their names?

A. Mr. Stevens and Mr. Hicks.

Q. Now when you said that you—in company with those inspectors—inspected the tanks and the pipe lines



(Libelant's Exhibit No. 12)

and valves, you mean, do you not, that you simply went over the vessel and looked at the tanks and the pipe lines and the valves for the purpose of familiarizing yourself with the layout; isn't that correct?

A. That is correct, yes.

Q. And you didn't at that time make any tests of the working order of the tanks or the pipe lines or the valves, did you?

A. No, sir.

Q. As far as you observed there was no test made of any of the vessel's tanks or pipe lines or valves until the vessel got to San Pedro after its voyage south bound from Portland to San Pedro; is that correct?

A. Not by the crew itself, but—

Q. No; I am asking you what you yourself observed?

A. No, I didn't see any.

Q. You didn't actually see any other tests made, did you?

A. No.

Q. You had been on the vessel, had you not, from April 1, 1943, until the vessel's arrival at San Pedro on April 17, 1943?

A. Yes.

Q. Now during that period of time from April 1, 1943, to April 16, 1943, no tests had been made of any of the vessel's tanks or pipe lines or valves, had they?

A. Oh, yes.

Q. What tests had been made?

A. The shipyard made their tests.

Q. On what date?

A. That I don't know.

Q. You weren't present then, were you?

A. No, I was not.

Q. Didn't I understand you to say that you were on the vessel at all times from April 1, 1943, to April 16, 1943?

A. I didn't live aboard the vessel, no.

(Libelant's Exhibit No. 12)

Q. When did you begin to live aboard the vessel?

A. On April 13, 1943.

Q. And was that the day it left—

A. That is right.

Q. Left Portland, Oregon? A. That is right.

Q. From then on were any tests made until April 16, 1943? A. Yes, there were.

Q. What tests were made?

A. There was a water test on the lines, in the cargo lines.

Q. Do you recall what day that water test was made?

A. It was the day before arrival at San Pedro.

Q. The day before the ship's arrival at San Pedro?

A. Yes.

Q. That would be April 15, 1943, wouldn't it?

A. That is right.

Q. And you say on that day the water test was made?

A. That is right.

Q. Up to that time that the water test was made on April 15, 1943, had you yourself been present at or had you seen any tests made of the vessel's tanks, pipe lines, or valves? A. No.

Q. Now will you describe again just what that water test was which was made on April 15, 1943?

A. Well, with all of the tank valves closed they pump water up into the cargo lines at a pressure of 125 pounds, and from what we observed there were no leaks.

Q. Now the vessel was at sea at that time, wasn't it?

A. That is right.

Q. Was that test made tank by tank?

A. Oh, yes, certainly.

(Libelant's Exhibit No. 12)

Q. In other words, there was a test made, and I am speaking now of this water test— A. That is right.

Q. There was a test made of each of the vessel's tanks while the vessel was at sea on April 15, 1943?

A. That is right, except for that one ballast tank that we had left to arrival at San Pedro.

Q. Now which tank did you leave full of water ballast when you were coming into San Pedro?

A. I think it was No. 5 main and No. 7 wings.

Q. Now the tanks on that vessel run crosswise of the vessel, don't they? A. That is right.

Q. And each one is divided into three compartments?

A. Yes.

Q. And when you speak of the wing tanks you mean the port and starboard tanks? A. Yes.

Q. So in each of those tiers of tanks there would be a center tank? A. That is right.

Q. So that your recollection is that the tanks which were left full of water ballast when coming into San Pedro were the center No. 5 tank and the starboard and port No. 7 tanks? A. That is right.

Q. And those tanks were not tested by this water test in the manner that you have described until after arrival at San Pedro, is that correct?

A. That is right.

Q. Now I show you the document which has been described as the vessel's rough bridge log book and is now marked Respondent's Exhibit 1 for identification, and I will ask you if there is any notation in this log book of any such water tests (handing document to witness). A. I don't see any.



(Libelant's Exhibit No. 12)

Q. Then your answer is that there is no notation in that log book of any of these water tests that you are referring to in your testimony, is that correct?

A. That is correct.

Q. Now going back to April 15, 1943; at the time these water tests were made it is your testimony, is it, that all of the vessel's tanks except No. 5 main tank and No. 7 port and starboard tanks were so tested?

A. That is correct.

Q. Now the tanks so tested had to be emptied, did they not, before the test could be made?

A. Yes, that is right.

Q. In other words, the water ballast was pumped out, is that correct?

A. That is right.

Q. Now through what line was the pressure applied on a given tank in making that test, after the valves had been closed; was it the discharge line or the suction line or some intake line?

A. It was a suction line.

Q. You are referring now to the main suction line and stripper line?

A. That is right.

Q. Well, then if I understand you correctly, this test was made by applying pressure back from the pump through the main suction line into the tank after the valves of the tank had been closed; is that right?

A. That is right.

Q. Now in saying that the valves of the tank were closed, you mean by that, do you not, that all openings into the tank except through the line through which the pressure was applied had been closed; isn't that right?

A. That is right, yes.

Q. Now was that pressure water pressure or was it air pressure?

A. That is right, it was water pressure.



(Libelant's Exhibit No. 12)

Q. Then if I understand you correctly, there was water pumped back into each of those tanks through the suction lines through which in the normal course cargo would have been sucked out of the tanks by the pumps; is that correct? A. That is correct.

Q. The pressure used was what; that is, in pumping that water into the tanks?

A. One hundred twenty-five pounds.

Q. Did you personally attend and inspect that water tank test with respect to each and all of these tanks that were tested on that occasion? A. I did not.

Q. How many times were you present when the tests were made? A. None.

Q. You weren't present when any of the tests were made? A. No.

Q. Then your testimony as to the tests that were made is based upon something that was told you; is that correct? A. By the chief mate, yes.

Q. The chief mate told you? A. Yes.

Q. What was his name? A. Morris.

Q. Do you know his first name or his initials, please?

A. Oh, no; it wasn't Morris, either. It was Danielson. No, Morris was the mate going down, and—

Q. Then on this voyage south when these tanks were tested Arthur Morris was the first mate and Axel Danielson was the second mate, is that right? A. Yes.

Q. And in nautical language the first mate is usually called the mate, is he not? A. That is right.

Q. Now who reported to you that these tests had been made? A. The chief mate.

Q. That would be Arthur Morris?

A. That is right.

Q. Was that a verbal report? A. Yes.

(Libelant's Exhibit No. 12)

Q. Prior to that report being made had you instructed Morris to make those tests? A. Yes.

Q. Do you recall what time of the day of April 15, 1943, you received that report from Morris?

A. Oh, no, I don't.

Q. Do you recall what time of the day it was reported to you that those tests were made?

A. It was in the evening; I know that.

Q. In the evening of April 15, 1943?

A. That is right.

Q. Now after arriving at San Pedro you said that another water test was made, is that correct?

A. That is right, yes.

Q. Did you observe that test? A. No, sir.

Q. So that all your knowledge of that is derived from the report of some ship's officer?

A. That is right.

Q. Is that true of the tests made of No. 5 main tank and No. 7 port and starboard tanks?

A. That is right.

Q. Was that test conducted in the same way as the tests made on April 15, 1943? A. That is right.

Q. How much water was pumped into each of those tanks under pressure when these tests were made?

A. No water; the pipe line was filled and then there is a constant pressure against the water in the pipe line, and with the valves closed. If the valves don't leak then there isn't any way for the water to come into the tank. That is the way we check them.

Q. In other words, the pipe was filled with water?

A. Yes, that is right.

(Libelant's Exhibit No. 12)

Q. And then pressure was applied against the valve leading into the tank, is that right?

A. That is right.

Q. Now with respect to any of these tanks, did that test disclose any water moving into the tank?

A. There were no leaks reported.

Q. By a leak you mean water going through the valve into the tank, is that correct? A. Yes.

Q. That is right, is it? A. Yes.

Q. Now did water go through any valves into any tank at the time any of these tests were made?

A. I would say no.

Q. You know that is the case, do you?

A. That is what the mate told me when he made his report.

Q. You don't know, as a matter of fact, that there was any test, any water test such as you have described, made with respect to the double valves on the cross-over in No. 5 tank or the double valves on the cross-over in the wings of No. 7 tank, do you?

A. Not that I know of, no.

Q. Now the purpose of this water test was to test the proper closing of the valves, was it?

A. That is right.

Q. Was any test applied to the valves on the discharge side? A. Not that I know of.

Q. Well, no such test was ever reported to you with reference to the valves on the discharge side, was it, at any time? A. No.

Q. Is this water test sometimes referred to as a hydrostatic test? A. I don't know.

Q. You don't know that?

A. I don't even know what hydrostatic means.



(Libelant's Exhibit No. 12)

Q. Were there on the Egg Harbor any cross-overs on the discharge side of the pipes leaving the pumps?

A. Yes.

Q. There were? A. Yes.

Mr. Hall: I will ask that this document which bears in the lower right hand corner the words "Diagrammatic Arrangement of Cargo Pipes, T-2 S. E. A-1, Pacific Tankers, Inc., San Francisco, Calif." be marked as Libelant's Exhibit A for identification only.

(The document was so marked by the reporter.)

Mr. Hall: May it be stipulated, Mr. Mack, that this exhibit for identification, which has just been marked by the reporter, may remain in my custody until the time of the trial subject to inspection by both counsel.

Mr. Mack: Yes, certainly.

Mr. Hall: Q. I show you, Captain, a document marked by the reporter as Libelant's Exhibit A for identification and I will ask you if that plan or blueprint shows the arrangement of the pipes and pumps and valves and lines that prevailed on the Egg Harbor during the period that we have been talking about (handing document to witness). A. Yes, it is.

Q. Now I have been speaking rather generally about pump lines and discharge lines, and I want to be sure that I understand those terms in the way that you do. In general, the pump lines are the lines from the tanks, that is, leading from the bottom of the tanks to the pumps, are they not? A. That is right.

Q. And the discharge lines are the lines leading from the pumps to the deck of the vessel and to the hose connections on the deck of the vessel?

A. That is right.



(Libelant's Exhibit No. 12)

Q. Then there is a line known as a stripper line, is there not? A. Yes.

Q. Which is common to all tanks? A. Yes.

Q. Is that a suction line?

A. That is a suction line, yes.

Q. Now I think it is your testimony that there was no report made to you of any water or other tests in respect to the discharge lines; is that correct?

A. That is right.

(Discussion by counsel off the record.)

Q. Now just what was it that the mate said to you, as near as you can now recall, when he reported to you that the water test had been made with respect to the suction lines?

A. I don't know. All I know is that the gist of it was that the tests had been made and there were no leaks found.

Q. Now was there water ballast in all of the tanks of the vessel on the way down from Portland on that first run prior to the time when they pumped out some of the tanks to make this water test? A. No.

Q. Which tanks were loaded with water ballast on that run? A. I don't know. I know how—

Q. Does the log show that? A. No.

Q. Do you know that there was any water ballast?

A. Oh, yes.

Q. But you can't state which tanks it was in?

A. No, I can't.

Q. Now, Mr. Mack spoke of a maiden voyage; was that the voyage from Portland, Oregon to San Pedro, or

(Libelant's Exhibit No. 12)

was it the voyage upon which the vessel carried that cargo of diesel oil and gasoline north to Point Wells?

A. That was the maiden voyage from Portland, Oregon to San Pedro and back to Point Wells.

Q. So when you refer to the maiden voyage you are referring to the trip south and the trip back again?

A. That is right.

Q. Both runs were included in the maiden voyage of the vessel, is that right?

A. That is right, yes.

Q. Prior to that maiden voyage the vessel had not been at sea except for this trial run to Astoria, is that correct?

A. She wasn't even at sea then. She was in the river.

Q. Well, that was the only time that the vessel had been under way prior to this maiden voyage, is that correct?

A. That is right, yes.

(Discussion by counsel off the record.)

Mr. Hall: Q. Now I think in your answer to a question by Mr. Mack you said that on the trip south on the maiden voyage they changed the water ballast around. What was that change?

A. On leaving the shipyard they had it in nearly every tank, I believe, and some of the tanks weren't pumped full so I wanted the ballast in the tanks brought up full; I wanted the tanks all filled up to the top. So we had to pump some of the tanks dry and then fill up the rest of the tanks, but I don't know which ones now they were. I know how I ballasted them; a certain way—but every other trip I changed them, like one trip I have No. 2 center and No. 3 wings and No. 5 center and No. 6 wings and No. 8 center and No. 9 wings, and on the last trip I filled up No. 2 wings and No. 3 center

(Libelant's Exhibit No. 12)

and No. 5 wings and No. 6 center and No. 8 wings and No. 9 center; but how I had the arrangement on that first trip I just don't know.

Q. Now in discharging water ballast at sea the water in the tank is sucked out through the suction lines and discharged through the discharging lines; isn't that correct? A. Pumping ballast?

Q. Yes.

A. It can be, or it can go through an overboard discharge that leads out of the pump room.

Q. But the water would have to go through the pumps, would it not? A. Oh, yes.

Q. Now in removing fluid from the tanks through the suction lines you can't get the fluid completely out of the tanks, can you, without using the stripper lines?

A. No.

Q. Is my statement correct?

A. That is right, yes.

Q. What I said was correct?

A. That is right, yes.

Q. In other words, to get the tanks clean of fluid you would have to use the stripper line, would you not?

A. That is right.

Q. Were you present when the water ballast was pumped out of these tanks before this water test was made on April 15, 1943? A. No.

Q. You didn't see them pump out the water ballast, did you? A. No.

Q. So you don't know what suction lines were used, do you? A. No, I couldn't say as to that.

(Discussion by counsel off the record.)

Q. Now you said that Captain Hogstrom was on the vessel during the loading operations? A. Yes.



(Libelant's Exhibit No. 12)

Q. I take it from that that he was on board the Egg Harbor at all times while the diesel oil was being loaded at San Pedro? A. That is right.

Q. Was he on board the Egg Harbor at all times while the gasoline was being loaded at El Segundo?

A. That is right.

Q. Did he then leave the vessel or did he proceed to Point Wells? A. No, he left the vessel.

Q. Now in answer to a question by Mr. Mack you said that you personally watched the cross-over valves being closed and sealed? A. That is right.

Q. I think in that connection you mentioned the cross-over valves at No. 5 tank and the cross-over valves at No. 7 tanks? A. That is right.

Q. Were any other cross-over valves closed and sealed? A. No, that was all.

Q. You have referred to the term "spectacles". The spectacles have an open part and they have a closed part, do they not? A. That is right.

Q. Was it the closed part of the spectacles that was used at any place in the pipe lines on the Egg Harbor on that voyage? A. No.

Q. Then, if I understand you correctly, no use was made of the spectacles in blocking the pipes on this voyage on which this cargo was taken on board at San Pedro and El Segundo; is that right?

A. That is right, yes.

Q. Now how were these valves on No. 5 tank sealed?

A. With a length of chain and a No. 1 car seal, a box car seal.

(Discussion by counsel off the record.)

Q. You mean, do you not, that the wheel handles of the two valves controlling the cross-over in No. 5 tank



(Libelant's Exhibit No. 12)

were chained together and the chain held by a car seal; is that right? A. That is right.

Q. Was the same method used with respect to the two cross-over valves in No. 7 tank?

A. That is right.

Q. Were any other valves chained and sealed?

A. The master valve between 9 tank and 8 tank were chained and sealed.

Q. What did they chain that valve to?

A. I don't know, probably another valve.

Q. Did you see them shut that valve?

A. No, I didn't see them shut it.

Q. Did you see them chain it?

A. No, I didn't see them chain it, but I saw it after it was chained.

Q. Was the chain sealed to something?

A. Yes, but I don't know what valve it was.

Q. Are you sure about that?

A. Oh, yes, it was chained and sealed, but I don't know which valve it was chained to.

Q. Now were there any other valves chained and sealed except these you mentioned; that is, the valve at No. 5 tank and the valve at No. 7 tank and the master valve between tanks 8 and 9?

A. That is all I can recall.

Q. Now were you on board at Point Wells when discharging of the cargo commenced on April 23, 1943?

A. Yes, I was.

Q. By reference to Respondent's Exhibit 1 for identification, I notice that on April 23, 1943, the SS Egg Harbor started its discharging of gasoline at 1:50 p. m.

(Libelant's Exhibit No. 12)

and started discharging diesel at 2:23 p. m.; is that correct (handing document to witness)?

A. That is right.

Q. Is that your best recollection now that that is accurate?

A. That is accurate as far as I know, yes.

Q. Then you were on the vessel until after 2:23 p. m., is that correct?

A. That is correct.

Q. When did you leave the vessel?

A. Somewhere around 3:00.

Q. And you went to a hotel then, did you?

A. I went to the Navy Office first and the agent's office, and then I went into Seattle. I was in Seattle then until I went to a hotel.

Q. When you left the vessel you were discharging both gasoline and diesel furnace oil?

A. Yes.

Q. What tanks were they discharging fluid from when you left the vessel?

A. That I don't know.

Q. I notice in this log book under the column entitled "Watch Officer's Signature for April 23, 1943," the initials J. C. H. Can you tell me whose initials those are?

A. The junior third mate, Mr. Hardy.

Q. J. C. Hardy?

A. That is right.

Q. I notice in the same exhibit on the page dated April 24, 1943, initials which look like A. F. D.

A. That is right.

Q. Can you tell me whose initials they are?

A. Those are the initials of Mr. Danielson, the second mate.

Q. Now when you left the vessel after it had commenced to discharge cargo at Point Wells what officers did you leave on board?

A. They were all on board, all four mates.

(Libelant's Exhibit No. 12)

Q. Now give me again so that we may get it clear who they were and what their names were and official designations.

A. There was Mr. Morris, the first mate, and Mr. Danielson, the second mate, and Mr. Thoren, the senior third mate, and Mr. Hardy, the junior third mate.

Q. Did any of those officers have anything to do with the operations connected with the discharging of the cargo?

A. The chief mate was in charge of it.

Q. Does the chief mate give orders to the pump man?

A. Yes, he does.

Q. Do you know whether or not the chief mate remained on the vessel at all times while you were absent?

A. Well, they told me he was gone after they started pumping, that he left the vessel.

Q. Then if I understand you correctly he was on the vessel when you left in the middle of the afternoon, but he left shortly thereafter; is that correct?

A. That is right.

Q. Now did any of these other mates leave the vessel while the cargo was being discharged on that day?

A. I don't know.

Q. How long had you known Axel Danielson who was the second mate on that voyage?

A. From Portland, Oregon.

Q. In other words, you first became acquainted with him when he joined the vessel about April 1, 1943, is that correct?

A. That is right.

Q. How long had you been acquainted with Mr. Hardy and Mr. Thoren?

A. Just the same time.

Q. Do you know anything about the knowledge that Mr. Danielson or Mr. Hardy or Mr. Thoren had with

(Libelant's Exhibit No. 12)

respect to the tanks' pipes and valves, and their methods of operating the same on this vessel?

A. I wonder if I could have that again, please.

(The pending question was read by the reporter.)

A. No, I don't, not for sure.

Q. Now I think you said that somebody called you at the hotel in Seattle and told you they were having some trouble in connection with this cargo that was being discharged?

A. Yes.

Q. Who called you, do you know?

A. Mr. Hicks.

Q. Did he tell you to come out to the vessel?

A. Yes.

Q. And you did so? A. Yes.

Q. What time did you arrive; was it after dark?

A. No, it was the next day in the morning.

Q. Then you didn't return to the vessel until the morning of April 24, 1943, is that correct?

A. No, sir, I did not.

Q. I want to be perfectly clear about that. You left the vessel about 3:00 on the afternoon of April 23, 1943, and you did not return to the vessel until the morning of April 24, 1943, is that correct?

A. That is right, yes.

Q. What time of the morning on April 24th did you reach the vessel?

A. Oh, I don't know, nine or ten o'clock, whichever it was.

Q. Were they discharging any diesel oil or gasoline when you reached the vessel in the morning?

A. Yes, they were discharging.



(Libelant's Exhibit No. 12)

Q. Do you know what tank they were emptying then?

A. No, they were only pumping out one cargo at a time.

Q. You mean by that they were pumping out only one tank at a time?

A. One grade of cargo, gasoline or oil, I don't know which.

Q. I see. Were Mr. Hicks or Mr. Stevens there when you arrived on the morning of April 24, 1943?

A. Yes.

Q. Were they both there? A. Yes.

Q. Did you talk with them? A. Yes, sir.

Q. Are they engineers?

A. Yes, sir, both of them.

Q. Are they connected in some way with the Keystone Shipping Company?

A. Yes, sir; I don't know the official titles, but they are company inspectors; that is what they call them.

Q. Now when you got back to the vessel on the morning of the 24th of April, 1943 who was the first person you talked to?

A. Both Mr. Hicks and Mr. Stevens.

Q. It was after talking to them that you talked to Messrs. Simonson and Kilbourne for the first time?

A. That is right.

Q. Did you talk to Messrs. Hicks and Stevens frequently that day? A. Oh, yes.

Q. They were in and out, weren't they?

A. That is right.

Q. And you did quite a lot of talking to them?

A. That is right.

(Libelant's Exhibit No. 12)

Q. And you did quite a lot of talking to them before you talked to Messrs. Simonson and Kilbourne, didn't you?      A. They told me about it.

Q. I am not asking you what they told you, but I am asking whether you talked to them before you talked to Messrs. Simonson and Kilbourne; I think I have already asked you that question, but it is a fact that you did talk to them before you talked to Messrs. Simonson and Kilbourne; isn't that true?

A. Yes, that is right.

Q. There were spectacles on the vessel on that voyage, were there?      A. Yes.

Q. Do you know where they were located?

A. In the pump room and on the discharging manifolds.

Q. That is, they were on the cross-overs between the lines on the discharge side of the pump room?

A. Yes.

Q. And they were on the cross-overs where the lines on deck go overboard, is that correct?

A. That is correct, yes, sir.

Q. But none of those spectacles were used?

A. No, sir.

Q. Now after the Egg Harbor discharged its contaminated products at El Segundo on May 1, 1943, and May 2nd, the vessel thereafter loaded out another cargo, didn't it?      A. That is right.

Q. You were master on that voyage, were you?

A. That is right.

Q. What did that cargo consist of?

A. May I look at the log book?

Q. Yes, certainly (handing the book in question to witness).

(Libelant's Exhibit No. 12)

(Discussion by counsel off the record.)

Q. Now after this contaminated cargo was discharged at El Segundo the vessel went on another voyage, did it not? A. That is right.

Q. How soon after that did it leave port?

A. It left port on May 2, 1943, on that voyage.

Q. From what port was that? A. El Segundo.

Q. What was the vessel loaded with?

A. Supreme gasoline and Standard gasoline.

Q. In other words, two grades of gasoline?

A. Yes, that is right.

Q. Where did the vessel proceed with this double cargo? A. To Point Wells again.

Q. Now on that voyage was there any contamination of those two grades of gasoline? A. No, sir.

Q. Speaking of this voyage now upon which the diesel oil and the gasoline loaded on April 17th and 18, 1943 was carried to Point Wells, do you know which tanks of the vessel carried gasoline and which tanks carried diesel oil?

A. May I refer to the ullage sheets?

Q. Yes, certainly.

A. I know the tanks, but I am not sure exactly—

Q. This is Respondent's Exhibit A for identification (handing documents to the witness).

A. Yes. Well, the gasoline was—No. 2, 3, 4, and No. 9 carried gasoline. No. 5, 6, 7, and 8 carried diesel oil.

Q. Was there anything in No. 1 tank? A. No.

Q. Well, now, the vessel's officers discussed, did they not, which tank or tanks could carry the gasoline and which tank or tanks could carry the diesel oil; isn't that correct? A. That is right, yes.



(Libelant's Exhibit No. 12)

Q. Now what officer or officers of the vessel, or members of the crew, had the duty of handling the valves during the unloading process at Point Wells?

A. All of the officers and the sailors on their watch, on their respective watches.

Q. Well, let me put the question this way: Suppose that it became necessary to change a valve during the unloading process; what ship's officer or officers would have to make that change?

A. The mate on watch or the chief mate.

Q. Would the pump man or the pump men have been under any duty to change the valves? Is that part of their province?

A. That is part of their job.

Q. Do they do that under orders of the mate?

A. Well, no, they don't. Usually a pump man—the pump men will go ahead and pump it out themselves.

Q. So that a pump man may change a valve without any orders from any mate of the vessel, is that correct?

A. That is right.

Q. Now do you know who at Point Wells directed the valves to be changed?

A. When they started discharging cargo the chief mate did, but thereafter I don't know who it was.

Q. But it became necessary to change the valves at that time in discharging that entire cargo?

A. That is right.

Q. Do you know who gave the orders for that?

A. No. I don't.

Q. Do you know who actually made the changes in the valves from time to time, incident to the discharge of that cargo?

A. No, I don't.



(Libelant's Exhibit No. 12)

Q. Wasn't it reported to you when you returned to the vessel that there had been a mistake in opening one of the valves on the vessel?

A. They thought so, but they were not sure.

Q. Whom do you mean by "they"?

A. Mr. Stevens and Mr. Hicks.

Q. They thought that somebody had improperly opened a valve?

A. Yes.

Q. They so stated to you, did they?

A. That is right.

Q. Did they both state that to you?

A. That is right.

Q. This was after you returned to the vessel on the morning of April 24, 1943?

A. That is right.

Q. There were no other tests or tests that were reported to you or that you knew anything about between April 10, 1943 and the time when they started to load diesel oil at San Pedro on April 17, 1943, except these water tests that you have already mentioned to us; is that correct?

A. That is right, yes.

Q. Do you know the pressure at which the gasoline and the diesel oil were being pumped out of the vessel at the time you left the vessel at about three o'clock on the afternoon of April 23, 1943?

A. No, I don't.

Q. Upon arriving at San Pedro on that maiden voyage and before the diesel oil was loaded at San Pedro where did the vessel dock?

A. At the Standard Oil dock.

Q. Was it at that dock all of the time that it was in the inner harbor at San Pedro on that occasion?

A. I think we were alongside the degaussing dock first.

(Discussion by counsel off the record.)

(Libelant's Exhibit No. 12)

A. (Continuing) Yes, that is right, we were tied up at the degaussing dock first.

Q. And where is that degaussing dock located?

A. In San Pedro.

Q. Is it in the inner harbor?

A. Yes, it is Pier 92.

(Discussion by counsel off the record.)

A. (Continuing) I mean, it is Berth 92.

Q. And you had the degaussing attended to, and then did the vessel go immediately to the Standard Oil dock for the loading of diesel oil? A. That is right.

Q. Was this vessel called the Bald Butte; was that a tanker? A. That is right, yes.

Q. Was it a tanker operated by the Keystone Shipping Company?

A. It was the Pennsylvania Shipping Company then.

Q. And that name was later changed to the Keystone Shipping Company, according to your understanding?

A. That is right.

Q. And now when you first joined the vessel about April 1, 1943, I think you said that Arthur Morris and Axel Danielson were at Portland, also? A. Yes.

Q. Were Messrs. Hardy and Thoren there at that time? A. They came later.

Q. When did they join the vessel?

A. About the 6th or 7th of April; I am not sure which.

Q. Have you anything in this material which you have given us here today that would give us when they joined this vessel?

A. No, but it was while she was in the shipyards.

(Libelant's Exhibit No. 12)

Q. Well, how long before the vessel was delivered by the builders did they join the vessel?

A. That I don't know.

Q. Do you know whether or not they spent any time on board the vessel before the vessel was delivered by the builders?

A. Oh, yes.

Q. They did? A. Yes.

Q. Do you know how much time they spent on it?

A. No, I do not; but I know they were down there.

Q. Now this vessel was delivered by the builders about April 10, 1943?

A. That is right.

Q. Were Messrs. Hardy and Thoren on the vessel during that trial run to Astoria?

A. I don't know. I know the mate and the second mate were, but I don't remember about the other two.

Q. Now after this contaminated cargo was discharged at El Segundo on May 1 and 2, 1943, and before the vessel started on that voyage upon which it carried the two kinds of gasoline, was there any change in the ship's officers?

A. Yes, sir.

Q. What was that change?

A. The chief mate was released, Mr. Morris.

Q. When was he released; was it after the vessel had discharged at El Segundo?

A. No, sir, it was at Point Wells.

Q. Oh, he was released at Point Wells before the vessel started back to El Segundo?

A. Yes.

Q. Then he must have been released about April 24 or April 25, along in there?

A. About the 25th, I think it was.

Q. Was he discharged? A. Yes.

(Libelant's Exhibit No. 12)

Q. Was he discharged for any reason connected with this contamination?

A. Yes, that was the reason he was released.

Q. Was he discharged because he was the chief officer left in charge at the time the contamination occurred?

A. Well, I don't know how to answer that.

Mr. Mack: That might call for his conclusion.

(Discussion by counsel off the record.)

Mr. Hall: Q. Was he discharged because of this contamination which had occurred?

A. He was discharged as a result of the contamination. I will put it that way.

Q. Well, you discharged him, didn't you?

A. Well, yes, I did.

Q. Under instructions? A. That is right.

Q. Now did you at the time you discharged him tell him why you were discharging him?

A. Well, he knew he was being discharged, anyway, and there was no reason to tell him; he expected it.

Q. But you must have given him some reason, didn't you, for firing him?

A. No, there was no reason given. I told him he was being fired and he expected it.

Q. Well, how do you know that he expected it?

A. Well, he told me.

Q. He told you that he had been expecting it?

A. Surely.

(Discussion by counsel off the record.)

Q. Now after this contamination occurred at Point Wells were there any other exchanges made in the ship's officers before the vessel sailed back to El Segundo?



(Libelant's Exhibit No. 12)

A. Yes, we made Mr. Danielson chief mate and Mr. Thoren went as second mate and Mr. Hardy went as senior third mate and we got a new junior third mate.

Q. Now after the vessel had loaded this double cargo of gasoline after May 2, 1943, was there any further change in the officers of the vessel before that voyage commenced?

A. No, sir.

Q. Are you still master of the SS Egg Harbor?

A. No, sir.

Mr. Hall: I believe that is all.

#### Redirect Examination

By Mr. Mack:

Q. Captain Olsen, I hand you a photostat here of a document which up at the top has the printing "Bill of Lading No. blank," and I will ask you if that is your signature on the bottom there (handing document to witness)?

A. Yes, that is my signature.

(Discussion by counsel off the record.)

Mr. Mack: This document is dated at San Pedro, California, April 17, 1943, and just so we have something to refer to I will offer this as Respondent's Exhibit 10 for identification.

(The document was so marked by the reporter.)

Q. Captain, was this bill of lading signed by you after the diesel had been loaded at San Pedro?

A. Yes; I would say yes.

Q. Do you know who prepared that bill of lading?

A. The Standard Oil people.

Q. Now I will show you another photostat, Captain, bearing the printed words "Bill of Lading No blank," at the top, and dated El Segundo, April 18, 1943, and I will ask you if that is your signature at the bottom there (handing document to witness)?

A. Yes, it is.

(Libelant's Exhibit No. 12)

Q. And that was for the gasoline?

A. That is right.

Q. Did you likewise sign this bill of lading after the vessel had loaded the gasoline at El Segundo?

A. That is right.

Mr. Mack: I will offer this document and ask that it be marked as Respondent's Exhibit 11 for identification.

(The document was so marked by the reporter.)

Q. Do you know who prepared this bill of lading?

A. The Standard Oil people.

Mr. Hall: My records show the fact that those are the same documents that are referred to in Paragraph 1 of our stipulation of December 6, 1944.

Mr. Mack: Yes, that is right. I believe I have no further questions.

Mr. Hall: That is all.

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Witness.

State of California,  
County of Los Angeles—ss.

I, W. L. Heathcote, a Notary Public within and for the County of Los Angeles and the State of California, do hereby certify:

That, prior to being examined, the witness named in the foregoing deposition, Lawrence C. Olsen, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

(Libelant's Exhibit No. 12)

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it should possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this third day of January, 1945.

(Seal)

W. L. HEATHCOTE

Notary Public in and for Los Angeles County,  
State of California.

[Endorsed]: Filed Jan. 22, 1945. Edmund L. Smith, Clerk; by John A. Childress, Deputy Clerk.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Libs. Exhibit No. 12. Filed Jan. 31, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Mr. Mack: I wish to also have the record show or have it understood that the testimony of Captain Olsen is also introduced in behalf of the respondent.

The Court: It is evidence for both sides, so far as that is concerned except, gentlemen, that the exhibits are not attached to that. I assume they are going to be introduced through other witnesses and referred to. For instance, there is the log that you have referred to and the different [147] logs in there, the rough log and the different kinds of logs, and the other exhibits referred to in the deposition are not in evidence. They were retained by counsel by stipulation that they would be available to both parties.



Mr. Mack: They are here, your Honor, and I don't believe all those documents are relevant. We took the precaution to have them identified by Captain Olsen at the time, but I do expect to introduce the smooth log and the rough log and anything else that seems pertinent, perhaps the ullage sheets too.

The Court: I notice in Captain Olsen's deposition that on direct examination he testified that there were certain tests made, and that under cross examination his information as to the tests was information conveyed to him by the mate. Apparently as I have interpreted the deposition he, himself, did not make the tests and the only information is that given to him by those that were serving under him.

I think also that the log from which information was obtained, at least it seems to me to be a log, should be introduced as to whether there is any record in it. The intimation in the deposition is that there was no notation made in the log on these various tests supposed to have been made under 125 pounds of pressure as they approached San Pedro.

Now, I don't know, not being a seafaring man like you two men that are accustomed to deal in the type of cases, [148] whether a test of that kind would ordinarily be reflected in a log or not.

In other words, the picture as presented here gives us no definite information that these tests that you have been talking about were made.

Mr. Mack: Well, it doesn't show in the log that way, if the court please, but on the other hand not everything that is done on the ship is put in the log.

The Court: I know, but that is something the absence of which might or might not be material, but it seems to



me that the logs that you have referred to here, at least, should be introduced in evidence.

Mr. Mack: I intend to put it in.

Mr. Hall: The only document I had marked at the time of taking Captain Olsen's deposition was the document which is now in evidence as Libelant's Exhibit 9.

The Court: That is the piping arrangement?

Mr. Hall: Yes, your Honor. A stipulation was concluded by counsel in this cause on December 6, 1944. That stipulation is on file and the printed copies of the stipulation in our printed memorandum book, page 5.

I desire to offer in evidence first, this paragraph 1, 2, 3, 4, and 5 of that stipulation.

The Court: Let me find mine. Subsequent events have changed that, have they not?

Mr. Hall: Yes. In justice to the proctors for [149] respondent, I think a change should be made in paragraph 6. I suggest this change, which will make the paragraph read in this way—

The Court: Let us make it as a new stipulation in lieu of paragraph 6.

Mr. Hall: Yes, sir, reading as follows:

"That the portion of the cargo thus carried by said S. S. Egg Harbor to Point Wells \* \* \*"

and here is my addition:

"\* \* \* plus products with which it was mixed in libelant's shore tanks, all of which was subsequently found to be so contaminated as to be unmerchantable and require refinery reprocessing and which was returned to libelant's El Segundo refinery in the S. S. Egg Harbor for reprocessing was: 25,507 barrels of said Standard diesel furnace oil, contaminated with gasoline, and 19,479 barrels of said Standard gasoline, contaminated with Stan-

dard diesel furnace oil. (No stipulation is made herein with respect to the time or times when, or place or places where, said products were ascertained to be contaminated, or with respect to the place or places where said contamination took place.)”

In other words, your Honor, the only change I have made in the paragraph is to insert in the second line of paragraph [150] 6 after the word “Point Wells”—

The Court: I think it is clear.

Mr. Hall: Pardon me, your Honor. Is that satisfactory, Mr. Mack?

Mr. Mack: Yes.

The Court: As to paragraph No. 7, it seems to me that there should be an additional stipulation in computation.

Mr. Hall: I have anticipated that, your Honor, and have prepared an alternative. I want to offer paragraph 7, but this is an alternative.

The Court: Suppose your alternative be submitted subject to verification by counsel for respondent. It seems to me that after you have No. 7 it would be easy to, on the same basis, compute the changed amounts.

Mr. Hall: I have just explained to counsel, your Honor, that the Schedule B which I have just handed him is a recomputation of paragraph 7 of the stipulation, using, however, the smaller quantities and it has been computed in exactly the same way. I am hopeful that counsel will stipulate to that in like manner as he stipulated to No. 7. I want to offer in evidence, however, paragraph 7 of the original stipulation of December 6, 1944.

Mr. Mack: I want to say this, if the court please, that I have done my best to cooperate.

The Court: I think both counsel have cooperated.

Mr. Mack: To cooperate throughout, and the court doesn't [151] know this, although I told Mr. Hall it. I was subject to rather severe criticism from my people about stipulating to No. 7 and I told that to Mr. Hall some time ago, but I think I have got them straightened out on that, so I would like a chance to go over this.

The Court: Certainly. I want to give you a full opportunity to verify it. I think the court, in view of No. 7, if it should find according to your theory, could even compute it. The court might have enough knowledge of arithmetic to be able to compute the same and obtain the same results as are obtained under Schedule B. However, I think you should have an opportunity to verify these figures.

Mr. Hall: Then, so far as my present record goes, it will be understood that paragraph 6 of the original stipulation of December 6, 1944 as I have amended it this morning is in evidence, and that paragraph 7 of such original stipulation is in evidence?

The Court: Yes.

Mr. Hall: Yesterday your Honor asked me for certain figures, which I think I have included in another schedule which I have designated as Schedule A, and which I will hand now to the clerk.

The Court: This is pretty much the same as Schedule B, is it not?

Mr. Hall: Yes. It is simply an illustrative schedule, the data being already in evidence by virtue of stipulation [152] or testimony.

The Court: Is it satisfactory, Mr. Mack, that these two schedules may be admitted in evidence, subject to verification by you as to computations?

Mr. Mack: Yes.



The Court: We will admit these in evidence, then.

The Clerk: Schedule A will be Exhibit 13 and Schedule B will be Exhibit 14 in evidence.

(Thereupon, the documents referred to were marked as Libelant's Exhibits Nos. 13 and 14, respectively, and were received in evidence.)

[LIBELANT'S EXHIBIT NO. 13]  
SCHEDULE A

<u>Item</u>	<u>Gasoline</u> <u>(bbls. at 60°)</u>	<u>Diesel</u> <u>(bbls. at 60°)</u>
(1) Products carried by the vessel which were not contaminated and which were run into shore tanks 61 and 41.	55,649	37,802
(2) Products carried by the vessel which were contaminated thereon and run into shore tanks 62 and 8	8,140	23,131
(3) Total products carried by vessel	63,789	60,933
(4) Products already in shore tanks 62 and 8, uncontaminated prior to being mixed with item (2), but contaminated by item (2)	11,339	2,376
(5) Products with respect to which libelant claims damages, being a total of item 2 and item 4	19,479	25,507

(1) Arrived at by subtracting item (2) from item (3)

(2) Arrived at by subtracting item (4) from item (5)

(3) Established by par. 4 of the Dec. 6, 1944 Stipulation

(4) Established by testimony of Fred R. Kilbourn

(5) Established by par. 6 of the Dec. 6, 1944 Stipulation.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 13. Filed Jan. 31, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.



[LIBELANT'S EXHIBIT NO. 14]

SCHEDULE B

Paragraph 7 of the Stipulation of December 6, 1944, assumed libelant to be entitled to damages on account of a contamination of 25,507 bbls. of diesel and 19,479 bbls. of gasoline, i.e., not only on account of the gasoline and diesel commingled in the cargo, but also on account of the uncontaminated gasoline and diesel in the shore tanks which became contaminated by mixture with the contaminated cargo. Libelant contends that this is a correct measure of damages.

If (contrary to libelant's contention above) it be held that damages should be allowed only on account of the gasoline and diesel commingled in the cargo (i.e. 23,131 bbls. of diesel and 8,140 bbls. of gasoline), then libelant's damages would be computed as follows:

Value in merchantable condition at Los Angeles area of part of cargo which was contami- nated	\$54,907.45
Add freight and insurance to Point Wells	9,260.75
	<hr/>
Value in merchantable condition at Point Wells of part of cargo which was contaminated	\$64,168.20
Gross value at Los Angeles area of products salvaged from contaminated part of cargo	\$42,441.80
Deduct handling charges at Point Wells	\$ 335.63

(Libelant's Exhibit No. 14)

Deduct freight and insurance to Los Angeles area	9,116.53	
Deduct reprocessing cost at refinery in Los Angeles area	1,736.00	
	<hr/>	
Total	11,188.16	
	<hr/>	
Net value of products salvaged		31,253.64
		<hr/>
Total damage		\$32,914.56

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 14. Filed Jan. 31, 1945. Edmund L. Smith. Clerk; by M. E. W., Deputy Clerk.

Mr. Hall: The only other thing I have, your Honor, is this. About October 30th of last year we served interrogatories upon the respondent under Rule 31, and those interrogatories were answered and the document was received in our office January 20th of this year.

The Court: Is that the one that was filed—

Mr. Hall: It is the document that we filed. It is marked "Interrogatories Propounded by Libelant under Admiralty Rule 31."

The Court: Filed in our court on the 22nd, I presume. "Answers of Respondent, United States of America, to Interrogatories Propounded by Libelant under Admiralty Rule 31."

Mr. Hall: Yes, your Honor.

Now, in addition, I desire to offer as an admission on [153] the part of the respondent, one of those interrogatories and the answer thereto. It is interrogatory No. 32 which reads as follows:

"After contamination of the cargo was reported to agents of Keystone Shipping Company on April 23, 1943, at Point Wells, describe fully and give the date and result of all such tests or inspections, if any, as were made at any time thereafter for the purpose of ascertaining the cause or causes of such contamination."

The answer to that interrogatory reads as follows:

"Discharging was stopped immediately. All tank valves were checked at once and found in order. All cross-over valves were checked and found in order except that the No. 5 cross-over valves were found sealed but partly open."

The Court: It may be admitted in evidence.

Mr. Mack: If you want to, it is all right with me to have all the interrogatories and answers go in.

Mr. Hall: No. I would not so stipulate, counsel.

The libelant rests.

Mr. Mack: I have a few questions I want to ask Mr. Kilbourn. I will call him as my own witness. [154]

FRED R. KILBOURN,

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

## Direct Examination.

By Mr. Mack:

Q. Mr. Kilbourn, I just want to clear up a few points in my mind, one of which I think is apparent, but I want to be sure it is correct.

Did the Egg Harbor take back these contaminated products southbound to El Segundo? A. They did.

Q. Is my understanding correct that the contents of shore tank No. 8 were pumped back onto the vessel?

A. Yes, the contents of shore tank No. 8 were pumped back into the vessel.

Q. All the contents of shore tank No. 8?

A. Not all the contents. We pumped as far as we could get. I think there was a cubic inch of product left in the tank.

Q. I mean so far as practicable, you pumped all of shore tank 8 back into the vessel?

A. That is right.

Q. Then, is the same true of shore tank No. 61? That was the gasoline tank.

A. Tank 61 was not pumped back. Tank 62 was.  
[155]

Q. I am in error. Shore tank 61 was the one that showed all clear? A. Yes, that is right.

Q. Now, were the contents, so far as practicable, of shore tank 62, all pumped back onto the vessel?

A. That is right. It was pumped back onto the Egg Harbor.



(Testimony of Fred R. Kilbourn)

Q. Did the Egg Harbor, to your knowledge, depart southbound?      A. It did.

The Court: May I ask a question? Do I understand that the parties are in accord and stipulate that the products as commingled, had no market value at Point Wells, and that the shipping them back to El Segundo for reconditioning in fact lessened the damages, if any?

Mr. Mack: I am not in a position positively to answer that, but I believe Mr. Kilbourn answered that in his testimony yesterday, that that was the case.

Mr. Hall: I will so stipulate that that is the case.

The Court: The only thing is, I don't know what the products were other than at Point Wells. There is nothing in the record to indicate that that was an economic way of handling the picture as it developed. In other words, how does the court know, or how is the record going to bring forth the fact that it wouldn't have been cheaper to have dumped the products at that time rather than bringing them back for [156] reconditioning?

I understand that stipulation 8, or whichever one it is, states that the parties agree on that method of arriving at the damages, and that may be sufficient.

Mr. Mack: We agreed that if witnesses were called by the Standard Oil, they would testify to that. That is what we agreed to.

The Court: In other words, I think it should be brought out very clearly to show that the reconditioning was a more economic method of fixing the damages. In other words, it would be the duty of the parties here to reduce the damages, if possible. For instance, in one stipulation here you have \$49,000.00 prospective damages, and another one \$32,000.

(Testimony of Fred R. Kilbourn)

Now, take, for instance, the \$32,000.00 damage. Were those products that were brought back worth that amount? I think you see my point, do you not?

Mr. Hall: I see your point, your Honor.

Now, yesterday Mr. Kilbourn testified that this mass, after Point Wells, had no market value.

The Court: I understand.

Mr. Hall: Now, we put that with paragraph 7 of the stipulation of December 6, 1944, and we have, if I remember, the stipulation, or in any event testimony from a witness that the facts are as stated in paragraph 7; namely, that this product in an uncontaminated condition at Point Wells had a value of \$101,412.55. [157]

The Court: I had overlooked that. That answers my question.

Q. By Mr. Mack: Reverting to the evening of April 23, Mr. Kilbourn, and the tests that were made by Standard Oil from the samples that were taken from the vessel's tanks, and I believe also shore tank 62, can you fix for us any more definitely than you did the time that those samples were taken? A. I cannot, no.

Q. Can you fix it by means of before or after discharge of the diesel commenced at 9:30 that evening?

The Court: That is when they started to pump the diesel out and cut off the pumping of gasoline at the same time?

Mr. Mack: That is correct, your Honor, when the second discharge of diesel commenced.

The Witness: No. I can't tell you when the definite time was, before or after pumping commenced. To tell the truth, there were samples being taken at all times. We took samples all the time, and my memory is confusing

(Testimony of Fred R. Kilbourn)

to me because no log was made of any time we took samples.

Q. By Mr. Mack: You didn't keep any record of the time?  
A. No record at all.

Q. The samples I was interested in particularly were the ones submitted to Laucks by you.

A. Yes. I know the ones you have in mind. [158]

Q. Is my understanding correct that you took samples from the vessel's tanks that evening, and shore tank No. 62, and submitted them to Laucks?  
A. Yes.

Q. And then, as to shore tank 8, the sample that you submitted to Laucks was taken the following morning around 8:00 o'clock?

A. Yes, that is right. When I came down in the morning, we took that sample.

Q. And that was after pumping or discharging into shore tank 8 had stopped and diversion had been made to shore tank 41?  
A. That is correct.

Q. Now, when the contamination was reported by your gauger about 4:30 on the afternoon of April 23rd in the gasoline, did it occur to you then to hold all pumping until both diesel and gasoline had been checked and tested?

A. No, because the only thing that we knew was contaminated at the time was the gasoline, and we didn't know anything about the diesel being contaminated at all. In fact, I didn't know until the following day. I was greatly surprised that it was contaminated.

Q. The diesel was, to all appearances, all right. Is that it?  
A. Yes.

Q. And so far as you could tell, it was all right?  
[159] A. Yes.



(Testimony of Fred R. Kilbourn)

Q. After discharge of the diesel alone commenced at 8:30 on the evening of April 23rd, were line samples taken by you or men under your direction every so often?

A. Yes. The gauger took samples every hour all through the night until the diesel was pumped out the following afternoon.

Q. What was his report to you on those samples?

A. Well, everything was all right so far as he was concerned. The diesel looked fine. You can't tell that diesel has a little gasoline in it at all, because so small a quantity will contaminate the diesel and bring the flash point down. So, you couldn't tell by looking at a bottle of diesel whether it is contaminated that way. We were looking to see if it was diesel or gasoline, and that is all we were looking for.

Q. But in all events, you didn't think it was necessary to hold all pumping on both diesel and gasoline until you had samples and had tests completed by Laucks?

A. That is right. We knew the gasoline was off, and that is all we worried about at the time. We didn't even think about the diesel being contaminated. There was no evidence of the diesel being contaminated. Not taking a flash test, we couldn't discover any contamination at that time.

Q. Could you have made the flash test at that time?  
[160]

A. No, at that time we could not. We had no equipment to make any flash tests.

Q. Now, reverting to the gasoline, when the pumping or discharging of the gasoline alone was commenced on the evening of April 24, it was pumped for a short



(Testimony of Fred R. Kilbourn)

time from tanks 2, 3 and 4 of the vessel, was it not, until it showed clear? A. That is right.

Q. Then, you switched the gasoline from tanks 62, shore tank 62, into shore tank 61? A. That is right.

Q. Can you tell us approximately how long it was after pumping or discharge of the gasoline alone was started until you switched to shore tank 61?

A. Well, it has to be just a rough estimate. I would have to stop and figure out the pumping time of both and fix other things. There was no exact time taken.

Q. You didn't keep any time?

A. No time on that at all.

Q. What would be your rough estimate?

The Court: We have covered this before. He testified yesterday he didn't keep any record. All these time items are estimates on his part. We have the log of the vessel and that should certainly disclose those things.

Mr. Mack: Well, we don't know what they were doing with their gasoline, your Honor. I wouldn't have any record of where they were pumping their stuff.  
[161]

The Court: You can't hand out one cubic foot of clear gasoline and one cubic foot of contaminated gasoline and say, "Well, we are only liable for the contaminated portion."

Mr. Mack: Yes, that is correct. Well, if he can give me a rough estimate or his best guess on that, that will be satisfactory and I will leave it.

The Court: Well, he was asked for a rough estimate before and I don't see why we should take time going over it again. Those questions were asked over and over again yesterday about rough estimates.

Mr. Mack: Very well, your Honor. That is all.

Mr. Hall: That is all.

(Witness excused.)

The Court: Gentlemen, I would like to have Mr. Simonsen take the stand for a moment. I would like to ask him a question.

L. SIMONSEN,

called by the court as a witness, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By the Court:

Q. Mr. Simonsen, in your handling of tankers, is it customary to discharge the products of a tanker that have different products, all at the same time?

A. If you are sure that you have positive protection between products. In other words, if you are blanked off [162] and you are sure that there is no chance for the gas to get into the diesel, you know, mix the products.

Here is my contention. We don't have it, as I said before. We blank them off and make sure so that there is no chance for a mix.

However, if I was ever asked to handle mixed cargoes with valves in between, I would pump one product at a time and then observe the outages on this product that is lying dormant in the tank to see we are not moving any of that product into the product we are discharging, you see. That is good practice, your Honor.

Q. I know, but if the tanker is in proper condition, there should be no mixing, should there?

A. If the tanker is in proper condition?

(Testimony of L. Simonsen)

Q. Yes.

A. You mean if the manifolds are properly—

Q. In other words, if the tanker is built to carry different types of products and if the tanker is in such condition or in proper condition to receive different types of products, then there should be no intermingling?

A. That is right. If the tanker is properly provided. I mean, if the manifolds are properly blinded and blanked off so that there is no possible chance that you could get from one side to the other.

Q. There are supposed to be two separate compartments?

A. Yes, two separate manifolds. [163]

Q. And the practice is to remove the two products at the same time?

A. That is right, sir.

Q. And the purpose is to reload that tanker as quickly as possible and get it on its way?

A. That is correct, yes, sir.

The Court: That is all.

#### Cross-Examination

By Mr. Hall:

Q. You used the term "our products" and the term "we." Do you mean the Standard Oil Company of California?

Yes, sir.

Q. Just prior to the outbreak of war, how many tankers did Standard Oil Company have operating in California?

A. Now?

Q. Just before war broke out and tankers were taken over by the government, roughly, say.

A. Roughly 20 tankers.

Mr. Hall: That is all, thank you.

The Court: Well, that is all. Any questions? I think the question asked is self-evident, but I wanted something in the record on that.

(Witness excused.)

Mr. Mack: At this time I would like to introduce on behalf of the respondents the smooth log of the Egg Harbor, which was identified by Captain Olsen in his deposition, as [164] Respondents' Exhibit 2, for identification.

Mr. Hall: Pardon me a moment. Have you the rough log there, counsel?

Mr. Mack: Yes.

Mr. Hall: There is one thing I would like to compare.

Mr. Mack: I will put them both in, but—

The Court: It doesn't make much difference because they will not be copied in the record. They are going up in their present form.

Mr. Mack: I am going to introduce both of them. Perhaps I had better introduce each one separately.

The Court: Yes.

Mr. Mack: The smooth log will be Exhibit A and the rough log will be Exhibit B.

The Court: Very well. They may be received.

(The documents referred to were marked as Respondents' Exhibits A and B, respectively, and were received in evidence.)

Mr. Mack: I will introduce the ullage sheet of the Egg Harbor. That indicates the difference from the top of the



tank to the liquid in it, whatever that differential may be for the northbound voyage, the sheet being dated April 23, 1943, and referred to in Captain Olsen's deposition as Exhibit 8 for identification.

The Court: It may be admitted. [165]

(The document referred to was marked as Respondents' Exhibit C, and was received in evidence.)

Mr. Mack: I will also introduce the ullage sheet for the southbound voyage from Point Wells to El Segundo when the cargo of contaminated products was carried, which was identified by Captain Olsen in his deposition as Exhibit 9 for identification. That would be Exhibit D?

The Court: Yes.

(The document referred to was marked as Respondents' Exhibit D, and was received in evidence.)

Mr. Mack: I also want to state that I have all the other exhibits that Captain Olsen identified. I just want to make that statement that I have them here in court, but I don't see any relevant purpose in introducing any of the others, so I don't propose to do it unless opposing counsel wants them in.

Mr. Hall: It will be perfectly satisfactory to us if they remain in court during the trial without further being offered in evidence unless one or the other so desires.

Mr. Mack: Very well. Captain Hogstrom, will you take the stand, please?

K. I. HOGSTROM,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: K. I. Hogstrom. [166]

Direct Examination

By Mr. Mack:

Q. Captain Hogstrom, what is your business?

A. Port captain for the Keystone Shipping Company.

Q. Do you hold any marine licenses of any kind, Captain?

A. Yes, sir, unlimited master's license.

Q. How long have you held that master marine's license? A. 20 years, sir.

The Court: You are going to have to raise your voice like you do on a ship after you leave port, so we can all hear you.

Q. By Mr. Mack: Speak up just a little, Captain.

Now, Captain, in your experience have you specialized in working with any type of ship, any particular type of ship?

A. Well, since 1925 I have been working with tankers exclusively.

Q. Whereabouts?

A. I was five years master tanker, and then I was loading master, and since 1941 I have been with the Keystone Shipping Company as port captain.

Q. Has your experience been largely on the West Coast of the United States? A. Yes, sir.

(Testimony of K. I. Hogstrom)

Q. What do your duties consist of, Captain, at the present time?

A. Well, mainly to get the personnel of the vessels [167] and also to see that these tankers are properly loaded at the terminals, Wilmington and San Pedro.

Q. Did you attend, Captain, at the loading of the Egg Harbor at San Pedro and El Segundo in April of 1943?

A. Yes, I did.

Q. Will you take a look at the log book, please, Exhibit A for the respondent, and tell us what product was loaded, if any, at San Pedro and when the date was?

A. Well, the product loaded at San Pedro was diesel oil. That was on April 17, 1943.

Q. And did you check the Egg Harbor at San Pedro before the diesel was commenced to be loaded?

A. I did.

Q. Please tell the court what you did.

A. Before the diesel was loaded, the first mate and myself and one quartermaster—the quartermaster opened the valves, that is the No. 5 cross-over valves, two valves, and the master valve on the No. 1 line between 8 and 9 tanks. Those were opened up and then closed down and sealed. We started the cargo, the diesel in 5, 6, 7 and 8.

Those valves were closed and sealed between 8 and 9 and between 4 and 5, and the numbers were taken off the seals which we have a record of.

Q. Captain, did you personally check all the valves on the ship before loading was commenced at San Pedro?

A. Yes, sir. I was in attendance at the checking of [168] the valves.

(Testimony of K. I. Hogstrom)

Q. And by the valves, I am talking about the respective cargo valves. A. Yes, sir.

Q. Now, was loading then commenced at San Pedro?

A. Yes, sir. Loading was commenced in the morning after inspection was made. Loading was commenced, I think, around 6:00 o'clock in the morning.

Q. And the diesel was loaded into tanks 5, 6, 7 and 8, I think you said? A. That is correct.

Q. Captain, in your opinion was that a proper trim of the vessel to load it that way?

A. Yes, sir, it was all right.

Q. And did you know at the time that a further cargo of gasoline was taken on at El Segundo?

A. Yes, I did.

Q. Now, after the diesel was loaded in those four tanks, did the vessel then go around to El Segundo?

A. Yes, sir.

Q. Did you ride it around?

A. No, sir, I did not.

Q. Were you present at El Segundo on the Egg Harbor before loading of gasoline commenced there?

A. Yes, I was.

Q. Now, before loading of gasoline commenced at El [169] Segundo, did you make any further tests or checks of the vessel? A. Yes, we did.

Q. What did you do?

A. Well, being a new tanker, never taking anything for sure, I told the mate to open up the suction valves in the No. 4 and 9 tanks.

Q. Were you present when that was done?

A. I was present and went down in the tanks myself.



(Testimony of K. I. Hogstrom)

Q. You personally went down in the tanks?

A. Yes, sir.

Q. In No. 4 and No. 9 tanks? A. Yes.

Q. Where was the gasoline to be loaded?

A. In No. 1, 2, 3, 4 and 9.

Q. Now, what happened, if anything, when you went down into tanks 4 and 9?

A. Well, after we opened the suction valves, it being a new tanker and being told they tested the valves going down, I was going to make sure there was no leakage of diesel into the tanks we were going to load gasoline in, and therefore I went down myself to inspect them.

Q. Did you find any leakage?

A. No, sir, no sign of any diesel in those tanks.

Q. What would have happened, Captain, if there had been a leakage when those suction valves had been opened? [170]

A. It would have leaked into tank 4 or 9.

Q. Now, after you made that test and had been down in No. 4 and 9 tanks, did you conclude that it was in order to commence loading the gasoline?

A. Yes, sir.

Q. Was loading then commenced? A. Yes, sir.

Q. Were you there all during the time loading took place? A. Yes, I was.

Q. Did the vessel then sail after loading of gasoline was completed? A. Yes.

Q. That was on the northbound initial trip to Point Wells? A. That is right, on April 18.

Q. Captain, were you in court here yesterday?

A. No, sir.

(Testimony of K. I. Hogstrom)

Q. There was considerable discussion about the No. 5 and 7 cross-over valves and whether they should be blanked off in handling different grades of cargo.

In your opinion, Captain, based upon your experience, is it required practice to blank off the 5 and 7 valves, the cross-over valves, down in the bottom of the ship when different grades of cargo are carried? A. No, sir.

[171]

Q. Why do you say that?

A. Well, if that was the case, they would make some provision for blanking them off, which there is not. There are two valves to check the crossing of cargo, and if the lines are properly tested, I don't see why there should be any blanked off in those tanks. In fact, there is no provision made for it and I don't believe it is the practice to do so. I never saw it done.

Q. Let me ask you this, in all your handling of tankers in your experience, have you blanked off No. 5 and 7 cross-over valves down in the bottom of the ship in cases comparable to this?

Mr. Hall: Just a moment. I don't think the proper foundation for that question has been laid in that it hasn't been shown that the witness was familiar with this particular piping arrangement in any other vessel.

Q. By Mr. Mack: Well, Captain, are you familiar with the piping arrangements in other tankers?

A. Yes. I wouldn't say all tankers, but most tankers.

Q. How many tankers are you working with at the present time?

A. Well, we have three coastwise tankers on the Coast, and then we have the off-shore ships coming in off

(Testimony of K. I. Hogstrom)

and on practically once every week or so. At the moment, we have one going to load now and one coming in tomorrow.

Q. Right now you are pretty busy in the Harbor. Is [172] that right? A. That is right.

Q. There is in evidence Libelant's Exhibit 9. I will ask you to take a look at that, Captain, and tell us what that is, if you know.

A. Well, this is a plan of a T-2 tanker, a T-2 SCA, which tanker is Swan Island built or some island built tanker, but I believe they have been building at Swan Island for the last two years.

Q. Was the Egg Harbor what is commonly known as a Swan Island tanker? A. Yes, sir.

Q. Are you working with tankers other than Swan Island tankers at the present time? A. Yes, sir.

Q. Do they have a cargo piping plan similar to what is before you? A. No, sir.

Q. Do any of those tankers have what are called "No. 5 and No. 7 cross-over valves" or similar cross-over valves down in the bottom of the ship?

A. No, sir. Some type tankers have, but the ones we have on the Coast haven't. They have what they call a run-around on each end of the ship. Of course you can cross over. There is what you call an equalizing valve.

Q. Captain, in operating these Swan Island tankers, do [173] you blank off the No. 5 and 7 cross-over down in the bottom of the ship in carrying mixed grades of cargo?

A. No, sir. There is no provision made for it.



(Testimony of K. I. Hogstrom)

Q. Well, do you think it is necessary in accordance with good practice to do that?

A. No, I don't believe so. If the line is properly tested with the valves closed, I don't believe it is necessary.

The Court: You are familiar with this recent bulletin put out by the Maritime Commission?

The Witness: Which bulletin is that, your Honor?

The Court: You are familiar with this recent bulletin, are you, referring to Libellant's Exhibit 11 for identification? (Handing document.)

The Witness: Yes, I have read that.

The Court: Would you say that was good practice?

The Witness: That is good practice. yes, sir.

The Court: That's all.

Q. By Mr. Mack: Now, Captain, I am looking at this Circular No. 27, identified as Libellant's Exhibit 11, and it uses the language in here "spectacle or blank flanges provided in the ship's lines."

A. Yes. We have those on the cross-overs on deck and in the pump room.

Q. Now, in the Egg Harbor, were spectacle flanges provided in the pump room cross-overs? [174]

A. Yes, sir.

Q. Were those used on this trip?

A. No, sir, they were open.

Q. Were spectacle or blank flanges provided down in the bottom of Nos. 5 and 7? A. No, sir.

Q. You relied there on the valves?

A. On the two valves, yes, sir.



(Testimony of K. I. Hogstrom)

Q. In carrying different grades of cargo in Swan Island tankers, Captain, have you ever put in blanks or spectacle flanges down in the 5 and 7 cross-overs?

A. No, we never have.

The Court: How many Swan Island tankers have you used?

The Witness: Well, we have, I believe it is around 40 tankers of that type right now.

The Court: 40?

The Witness: Yes. Most of them are operating on the East Coast, but quite a few are operating on this coast, loading at San Pedro and El Segundo.

Q. By Mr. Mack: Captain, were you up at Point Wells during any of the time of the subsequent events?

A. No, sir.

Mr. Mack: You may cross examine.

#### Cross-Examination

By Mr. Hall:

Q. You mean that the Keystone Shipping Company operates [175] 40 T-2 tankers?

A. I believe so of that type, yes.

Q. How many of the 40 have you become familiar with?

A. Well, I can probably name them. There is the Egg Harbor—

Q. Just tell me approximately how many.

A. Well, oh, I will say seven or eight.

Q. Now, I think you said at San Pedro you at first opened up the valves in the cross-over in No. 5 tank, the cross-over being marked on this plat, Libellant's Exhibit 9, as G. Is that correct?

A. Yes, I opened them up and closed them.

(Testimony of K. I. Hogstrom)

Q. You opened them up and then closed them?

A. Yes, and made sure they were closed.

Q. What else did you open up and then close?

A. The master valves there between 8 and 9 tanks.

Q. Now, will you indicate where that master valve is here? A. 8 and 9—it is on this line here.

Q. If I mark this valve with the letter Q, that would be the valve which you opened up and then closed down?

A. Closed down and sealed.

Q. Now, did you open up and close anything else?

A. No, not on deck. We opened up, after we started unloading, we opened up the suction valves.

Q. Now, let me get this clear. At San Pedro you [176] didn't open up and close anything else than these valves in G, and the valve which you have marked Q. Is that right? A. Yes.

Q. Now, you said, I think, in your testimony, that you checked all the cargo valves on the ship?

A. Well, we checked them. There is no reason for checking except when you load the ship you open up your suction valves and check to see that the cargo is coming in.

Q. By "check" you mean you went around and looked at them? A. Yes.

Q. You didn't do anything more than that?

A. I watched the men do that.

Q. What did you observe them do?

A. Turn the valves.

Q. All the valves?

A. It is not necessary to turn every valve on the deck.

Q. Now, I am going to leave out for the moment these valves which are on the cross-over G and the valve G. You said you checked all the other valves on the ship.

(Testimony of K. I. Hogstrom)

I am asking you if you did anything more than look at those valves and see what position they were in?

A. Well, after checking those valves and sealing them, then we opened up the suction valves and the Nos. 5, 6, 7 and 8 to load the cargo.

Q. Did you check or do anything with any other valves [177] than those that are on the cross-over marked G, the valve Q, and the suction valves you have mentioned?

A. Yes. There is a drop valve. I think the cargo was loaded down through the 5 drop valve, and then through suction into the tank.

Q. Now, you said that after the diesel cargo was loaded at San Pedro you went down into the center tank and looked to see—

A. Not to San Pedro. I didn't say that.

Q. What did you say about going down into a tank to see if there was a leak?

A. At El Segundo before loading the gasoline.

Q. Pardon me. At that time when you went down into that tank, it was at El Segundo? A. Yes.

Q. And the diesel had already been loaded, but you had not yet loaded the gasoline? A. Yes.

Q. What tank did you go into?

A. Nos. 4 and 9.

Q. All right. Take No. 4 tank. What did you look at? Did you go clear to the bottom of the tank?

A. Yes.

Q. What did you look at when you got to the bottom of No. 4 tank?

A. At the suction to see if there was any leak. [178]

(Testimony of K. I. Hogstrom)

Q. Will you mark the suction that you looked at? We will give it the letter R. Will you mark an "R" on the suction you looked at?

A. Here (indicating).

Q. Now, where you have indicated, I will put the letter R.

A. Both those valves, one there and one here.

Q. We will put R there and R-1, and we will put R-2. Now, what did you look at on that occasion?

A. I looked underneath this to see if there was any sign of diesel underneath there.

Q. That is at R. What else did you do?

A. Then, I came up on deck.

Q. Did you do anything with respect to R-1 and R-2?

A. Well, they were closed again. There was no diesel found down below, and they were closed again.

Q. You mean you closed them at that time?

A. Yes, and then they were opened up later on.

Q. Did you check any other valves or bell mouths, as you call them, in tank 4? A. No, just one.

Q. You didn't go in the center tank at all?

A. No.

Q. You didn't go into the port tank?

A. No, sir. I looked down from the top, but I couldn't see anything. [179]

Q. Now, going to tank 9— A. Yes.

Q. Did you go down to the bottom of No. 9 tank?

A. Yes, down to the bottom of 9 tank.

Q. What did you look at there?

A. At the same thing. We opened those two valves on here on this line, these two right there (indicating).



(Testimony of K. I. Hogstrom)

Q. We will mark those two valves that you have just referred to as "S", and we will mark the bell mouth as "S-1."

Now, then, what did you look at?

A. Under the bell mouth to see if there was any sign of diesel.

Q. And before you did that looking, those valves at S had been opened? A. Yes.

Q. Did you look at any other bell mouths or valves in tank 9? A. No, I did not.

Q. Either starboard or port?

A. I just looked down through the hatch.

Q. But you didn't go down into either the port or starboard tanks in No. 9? A. No, sir.

Q. Now, you take the position that if blanking off had been necessary in these cross-overs in Nos. 5 and 7 tanks, that spectacles would have been provided in those cross-overs [180] in the bottom of the tanks, don't you?

A. If they wanted them blanked off, I should think they would be, yes.

Q. Did you notice that there were spectacles in the cross-overs in the pump room, which have been marked L and M?

A. Yes, sir. They are there, but they were not blanked off.

Q. They were not blanked off on this trip?

A. Not in the pump room.

The Court: Why not?

The Witness: Well, your Honor, the ship just came out of the shipyard and it came down here and I really couldn't say why they were not blanked off down here. They should have been, but they weren't blanked off.

(Testimony of K. I. Hogstrom)

Q. By Mr. Hall: I think you testified that you understood there had been a previous water test or, as you call it, a hydrostatic test?

A. That is what Captain Olsen told me. I asked him if he had made the test of the lines which we always did before loading the cargo.

Q. What you know about that is what Captain Olsen told you?

A. That is right, sir. I believe I asked the first mate if he had tested the line, and he said yes.

Mr. Hall: That is all.

The Court: Captain, I would like to ask you a question. [181]

Of course, you learned afterwards, after the loading of this cargo, that in unloading and pumping from different tanks the product became commingled, did you not?

The Witness: Yes, I heard of it afterwards.

The Court: In other words, in your opinion, what would cause such a condition?

The Witness: Well, of course I wasn't up there, your Honor.

The Court: I know, but you say that everything was tight and it was all in separate tanks.

The Witness: Yes, sir.

The Court: Then, unless there was something wrong, when they worked the pump on the gasoline and diesel oil, they would have come out gasoline and diesel oil, would they not?

The Witness: It could be done on the ship discharging or also ashore.

The Court: But I am assuming.

(Testimony of K. I. Hogstrom)

The Witness: Yes.

The Court: I am assuming that they started to unload this vessel at Point Wells and they were pumping from a tank that had gasoline and a tank that had diesel oil.

The Witness: Yes.

The Court: And that at the end of the hose it showed commingling. What would cause such a condition?

The Witness: Well, it could be due to pumping two cargoes at one time and by an unequal pressure if there was a [182] leak in the valve somewhere. I mean the discharge valve, not the suction valve.

The Court: There had to be a leak some place?

The Witness: Yes.

The Court: It couldn't have gotten together unless there was a leak some place?

The Witness: That is right.

The Court: That is all.

Q. By Mr. Hall: Did this opening and the closing of the valves in the cross-over on G and also the opening and closing of the valve at Q occur just before you loaded the diesel at San Pedro?

A. Will you say that again?

Q. Did it occur just before you loaded the diesel at San Pedro? A. I don't quite understand you.

Mr. Hall: Will you read that question?

(Question read.)

The Witness: Yes, sir.

The Court: Will you point out on this where the cross-over valve No. 5 is?

(Testimony of K. I. Hogstrom)

The Witness: Right here. There is one cross-over here and one there. That is between the middle line and the starboard line.

The Court: Well, assuming that at arrival at Point Wells all cross-over valves were checked and found in order [183] except that No. 5 cross-over valves were found sealed but partly open, what effect if any would that have?

The Witness: Well, if that was the case, your Honor, that valve must have been opened up on the way going north because I was there personally and watched them turn the valves. They opened the valve and turned it down tight.

The Court: What effect would that have? Would that account for the commingling here?

The Witness: It probably would if there was a leak.

The Court: That is all.

#### Re-Direct Examination

By Mr. Mack:

Q. Captain, were any samples taken of the diesel in the vessel's tanks at San Pedro by the vessel?

A. No, sir.

Q. Or anybody on it before or after it had been loaded?

A. No. The samples were taken by the Standard Oil gauger. The gauger took the samples and we were given an O.K.

Q. The Standard gave you an O.K. on the cargo?

A. Yes.



(Testimony of K. I. Hogstrom)

Q. Now, at El Segundo did you or anybody whatever on the vessel take any samples of the gasoline after it had been loaded in the tanks? A. No, sir.

Q. You relied again there on the Standard Oil? [184]

A. Well, I don't recall whether Standard Oil took samples up there. I couldn't say that.

Q. Now, when you checked in No. 4 tank at El Segundo before loading of gasoline was commenced, did you check in tanks 3 and 2 as well?

A. No, because the same pipe line runs through these tanks. The 3 or starboard pipe line takes in 1, 2, 3 and 4 tanks. By opening one suction valve, if there wasn't any leak in that, there wouldn't be in the others. That is close to the No. 5 tank, and if the ship had a stern drag, it would come in there first.

Q. That was customary practice to check as you did at both San Pedro and El Segundo?

A. Well, I wouldn't say it is customary. I do it for my own satisfaction, just to satisfy myself there are no leaks, although they said the pipe lines were checked.

Mr. Mack: That is all.

Mr. Hall: That is all.

The Court: That is all.

(Witness excused.)

Mr. Mack: May Captain Hogstrom be excused? He is busy down at the Harbor with several tankers.

The Court: So far as the court is concerned, he may be excused.

Mr. Hall: Yes.

Mr. Mack: I will call Mr. Hicks. [185]

R. J. HICKS,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: R. J. Hicks.

Direct Examination

By Mr. Mack:

Q. Mr. Hicks, what is your business?

A. I am assistant port engineer for the Keystone Shipping Company.

Q. Do you hold any marine license, Mr. Hicks?

A. Chief engineer.

Q. How long have you held a chief engineer's license?

A. About 14 years or 15 years.

Q. Now, in your work have you dealt particularly with any type of vessel?

A. Well, most of the time with tankers.

Q. How long have you been working with tankers?

A. I would say altogether 20 years.

Q. Have you sailed on tankers? A. Yes, sir.

Q. How long did you sail on tankers?

A. About 13 or 14 years.

Q. How long have you been doing shore work?

A. Since 1937.

Q. And what are your duties? [186]

A. Well, the upkeep of the ship, loading and discharging of ships.

Q. Now, were you up at Point Wells, Washington, when the Egg Harbor arrived here on the early morning of April 23, 1943? A. I was.

Q. Were you on the dock waiting for her to come in?

A. Yes, sir.

(Testimony of R. J. Hicks)

Q. Before that time, Mr. Hicks, had you been on the Egg Harbor at any time?

A. I have been on it several times.

Q. Where was that?

A. When she was being built by Kaiser at Swan Island.

Q. Were you down on the vessel just before delivery was taken?

A. Well, I couldn't say how many days, but probably two or three days.

Q. And that was while she was still at the Swan Island yard? A. Yes.

Q. Did you go on the trial run of the vessel?

A. No, sir.

Q. When you were there at the Swan Island yard, was Captain Olsen on board? A. Yes, he was.

Q. Were any of the mates on board? [187]

A. They were all there.

Q. Were all the mates licensed officers?

A. Yes, sir.

Q. Had any of the mates, to your knowledge, had any prior experience with tankers?

A. Two that I know of.

Q. Who? A. The first mate and second mate.

Q. Now, Mr. Hicks, getting back to Point Wells again, when the vessel arrived there, what type of weather was it at the time?

A. It wasn't very bad when it first arrived but at 8:00 o'clock a very strong wind came up.

Q. Did that delay discharging operations?

A. It delayed the start of it.

(Testimony of R. J. Hicks)

Q. Were you on board or on the vessel up to the time discharging commenced?

A. I don't think I came on there until about noon because it was so rough. I couldn't get the boat tied up close enough to the dock.

Q. When the vessel got close enough to the dock to tie up, you then boarded her? A. Yes.

Q. What did you do?

A. I stayed until they started discharging.

Q. Did you go over any of those valves or check any of [188] the piping? A. No, sir.

Q. Will you take a look at the log there and tell us when discharging commenced?

A. Discharging commenced at 1:50 on gasoline, 1:50 p. m. on the 23rd.

Q. When did discharge commence on the diesel?

A. 2:23 p. m.

Q. So that when the diesel was discharged, the two products were going over the side at the same time?

A. That is right.

Q. Now, is it customary in tanker operations to carry different grades of cargo? A. It is.

Q. Mr. Hicks, after discharging commenced, what did you then do?

A. I had to go to Seattle to make a telephone call.

Q. That was on business relating to the company?

A. Yes.

Q. And what did you next hear about or do with reference to the Egg Harbor?

A. Well, as near as I can remember, about 5:00 o'clock I got a call that they had contamination and they had stopped discharging.



(Testimony of R. J. Hicks)

Q. Do you know who that call was from?

A. No, I don't remember who the call was from. [189]

Q. Did you then come back to the Egg Harbor?

A. I did.

Q. How far was it from Seattle to Point Wells?

A. Oh, approximately 15 miles.

Q. When did you get back to Point Wells then?

A. I don't remember the exact time. It was around 6:00 or a little after.

Q. When you got back, did you go on board the Egg Harbor?            A. At once.

Q. When you arrived back there, did you have any discussion with any representatives of the Standard Oil Company, either Mr. Kilbourn, Mr. Simonsen, or anybody else?

A. I think I talked to both of them.

Q. Was that before you boarded the ship?

A. No. I think it was after I boarded the ship.

Q. And came back off?            A. Yes.

Q. All right. When you boarded the ship, what did you do?

A. Well, I asked the second mate who was on watch what was wrong, and he said he didn't know, and I said, "Let's check the valves," which we did.

Q. Did you then check the valves?            A. Yes.

Q. What did you find? [190]

A. We found all of them in order except the cross-overs in No. 5 tank and they were slightly open.

The Court: Were the seals broken?

The Witness: No, sir, they were not.

(Testimony of R. J. Hicks)

Q. By Mr. Mack: When you say slightly open, tell us what you mean by that.

A. Well, they may have been open four or five turns. You couldn't tell. I didn't close them myself. One of the quartermasters closed them.

Q. When you found the No. 5 cross-overs slightly open, did you order them closed? A. Yes, sir.

Q. Were they closed in your presence? A. Yes.

Q. Was a wrench used? A. No.

Q. Is it necessary to use a wrench to close them?

A. Well, I don't think so.

The Court: Don't they have wheels on them that you use as leverage to turn them?

The Witness: Yes, the wheels are about 15 inches in diameter.

Q. By Mr. Mack: Now, when you found those—when you first saw the No. 5 cross-over valves, they were sealed, you say? A. That is right. [191]

Mr. Mack: Does the court understand what that seal business is? I am frank to say I didn't at first.

The Court: What?

Mr. Mack: Is it clear to the court what this seal business is? I can have Mr. Hicks draw a diagram. I didn't understand it at first.

The Court: I don't know what you are talking about now.

Mr. Mack: The seals on the No. 5.

The Court: Oh, yes. I think I understand. You might see if I am correct, Mr. Witness, that when the valves are set, the wheels are chained together.

The Witness: In most cases they are, because you have to have some place to chain them.

(Testimony of R. J. Hicks)

The Court: You lock them in position, and then there is a seal like on a box car to indicate whether or not they have been tampered with?

The Witness: That is right, but these two valves happened to be sealed with two because the wheels were very close together and they used that to interlock them.

The Court: That would indicate that they had been opened at sea during the voyage, would it not?

The Witness: No, the seals were interlocked around each wheel and then put through each other. They were locked like that, you see. Your wheels are about, oh, two inches apart, I guess, on these two valves.

The Court: Well, then, with the seal, the valves still [192] could be loosened?

The Witness: No, sir, very little, not enough to unseat them.

Q. By Mr. Mack: Mr. Hicks, would it be possible during the course of the voyage for somebody to break the seals, move those valves and reseal them?

A. It would.

Q. Now, the same thing would be true if the vessel were in port, would it not? A. It would.

Q. Now, after the No. 5 cross-overs were shut down tight, what did you then do?

A. I think I talked to Mr. Kilbourn and we decided to try pumping again with both grades.

Q. Was pumping resumed then with both grades?

A. We started.

Q. How long did that last?

A. A very few minutes. It was still off.

Q. What was still off? A. The gasoline.

Q. Was pumping then stopped? A. Yes, sir.

(Testimony of R. J. Hicks)

Q. On the vessel?           A. That is right.

Q. Now, what happened next, Mr. Hicks?

A. Well, we took samples or rather the Standard Oil [193] took samples, and we waited awhile and decided to start pumping with one grade only, which we did on the diesel.

Q. Let me ask you this while I think of it. Before discharging of any kind was started from the Egg Harbor up there at Point Wells, did the vessel take samples from any of the tanks?           A. It did not.

Q. Did the Standard Oil Company take samples from the vessel's tanks?           A. They did.

Q. Those are the regular bottle samples?

A. That is right.

Q. And were you given a clearance by the Standard Oil Company that the cargo was in order before you started discharging?

Mr. Hall: Just a moment. I will object to that as calling for a conclusion of the witness.

Mr. Mack: Well, I will reframe the question.

Mr. Hall: No proper foundation has been laid.

Mr. Mack: I will reframe the question.

Q. By Mr. Mack: Were any statements made to you by any representative of the Standard Oil Company about the results of the samples taken?

A. No, sir, they did not. They said—someone came down and said it was all right to start pumping.

Q. Someone from Standard Oil? [194]

A. Yes, sir.

Q. And until that time had you started any discharging from the vessel?           A. None whatever.



(Testimony of R. J. Hicks)

Q. Do you know who that was from Standard Oil that told you that?

A. No, I don't remember who it was.

Q. One of the shore men? A. Yes.

Q. Now, was discharge of diesel alone then commenced some time later that evening? A. It was.

Q. Can you refer to the log and tell us the precise time?

The Court: Gentlemen, is there any question about that?

Mr. Mack: I don't believe there is, your Honor.

The Court: Then why go into it? It shows when they started to pump the separate grades it came out all right except the gasoline for just a short time showed a little coloring and then it cleared up.

Mr. Mack: That is right.

The Court: There is no use covering those things that are admitted, Mr. Mack.

Mr. Mack: Very well.

The Court: There is no dispute about it.

Q. By Mr. Mack: Mr. Hicks, were you on board the Egg [195] Harbor all that night? A. Yes.

Q. And after diesel commenced, after pumping of diesel was commenced alone, was any change in any valve or pumping equipment made to your knowledge up to the time discharge of the diesel stopped?

A. None at all.

Q. Did you receive a report at any time on April 23rd that the diesel was off? A. No, sir.

Q. Did you receive a report at a later time from the Standard Oil people that the diesel was off?

A. Yes, sir.

(Testimony of R. J. Hicks)

Q. When was that approximately?

A. That was the next day in the afternoon. I don't remember exactly what time. It was early afternoon.

Q. What did they tell you?

A. They told me that the first diesel we pumped off was off flash.

Q. And they referred to what diesel?

A. Well, it was in the first tank we pumped into, which was later identified as tank No. 8, I think, but I didn't know at the time.

Q. Mr. Hicks, did you go ashore and inspect any of the tanks of the Standard Oil?      A. No, sir. [196]

Q. Did you see any of the samples that they took?

A. I just saw them in the bottle, but that is all.

Q. Were you present when any samples were taken from the ship's tanks on the evening of April 23rd?

A. Yes, sir.

Q. Mr. Hicks, relative to the respective density or weight of gasoline and diesel, which is the heavier?

A. Diesel.

Mr. Mack: You may cross examine.

The Court: Ask him what was wrong, what caused the intermingling of those products.

The Witness: I really don't know.

The Court: Well, afterwards the Egg Harbor made another voyage up there, another trip?

The Witness: That is right.

The Court: With mixed cargo?

The Witness: I think it did. I am not positive what cargo she had at that time, but I think it did have two grades at that time.

The Court: They didn't have any trouble that time?

(Testimony of R. J. Hicks)

The Witness: No.

The Court: You did have trouble—

The Witness: The first time.

The Court: And you were never able to determine what was the cause of it?

The Witness: No, sir. [197]

The Court: You knew something was wrong?

The Witness: Something was wrong, that is right.

The Court: In other words, if there had not been anything wrong, there wouldn't be any commingling?

The Witness: No.

The Court: That is all.

Mr. Mack: That is all.

Mr. Hall: That is all.

(Witness excused.)

Mr. Mack: Now, if the court please, I have one more witness, but he is not here.

The Court: That gives me a good excuse to take an early recess.

Mr. Mack: I want to say this, your Honor. In these ship cases we have an awful hard time with our witnesses. The men are scattered all over and I have been unable to locate the other mates. I wanted them here.

I located the second mate on the vessel Fort Stanley, but it is at sea. However, the chief pump man, Mr. Hilligos, is due in here tomorrow noon on a ship, and I was wondering if it would be agreeable to the court and opposing counsel if we could adjourn until, say, Friday morning, until we could get him up here and hear his story.

The Court: The court's calendar is such that I can do it if it matters.

Mr. Hall: Would it be possible for you to suggest a [198] possible stipulation as to what he might testify to? The reason I ask is that I am holding people here from Seattle, and I don't like to let them go until the case is over.

Mr. Mack: I think I heard Mr. Kilbourn say this morning that he expected to be here a couple of days.

The Court: You should not have been listening.

Mr. Mack: That's right. Well, as I understand it now, Mr. Hilligoss will testify that when the vessel arrived at Point Wells, he personally checked and set all the valves including the No. 5 cross-over, and that all the valves were tight and set; that he then left the vessel after discharging. I am not clear on this, whether he left the vessel before discharging commenced or after and then later returned.

The Court: Does he know what caused this intermingling?

Mr. Mack: No, he doesn't.

The Court: What is his testimony going to add?

Mr. Mack: The only thing that his testimony would add would be that it would account for what he, as chief pump man, was doing.

The Court: Any pump man will testify that he did everything that was possible and that everything was in order. A man is going to do that for his own protection. It is usually recognized that the crew of a boat will remain loyal to the ship.

I think if that is all he is going to testify to, that you should be able to stipulate that if he was present he



[199] would testify that he set all the valves. Would that answer your purpose?

Mr. Mack: Set all valves, checked them, and closed them.

The Court: You must recognize, counsel, that there is something wrong.

Mr. Mack: That is right, your Honor, and frankly—

The Court: And the burden is on you.

Mr. Mack: Yes, the burden is on me as representative of the ship and its operators to present what we know about the case.

The Court: Somebody is holding out something, counsel, some place along the line because somebody, some place, has determined the cause of this commingling, and those that had charge or custody of the vessel were in a better position to ascertain and learn the cause.

Mr. Mack: I agree with you, your Honor.

The Court: Would you stipulate that if this pumper were present he would stipulate as Mr. Mack has outlined?

Mr. Hall: Well, might we do this, your Honor? I know you want a recess. Maybe we could go over the noon hour and it might be that at 2:00 o'clock we will have that.

The Court: Do you have any other witnesses this afternoon?

Mr. Mack: No, your Honor.

The Court: We will take a recess until 2:15, gentlemen. [200]

Mr. Mack: Very well.

(Thereupon, at 12:00 o'clock noon a recess was taken until 2:15 o'clock p. m.) [201]

Los Angeles, California, Wednesday, January 31, 1945. 2:15 p. m.

The Court: Proceed, gentlemen.

Mr. Mack: If the court please, I have prepared a brief sketch of what Mr. Hilligoss would testify to according to the information I had but Mr. Hall didn't feel he could stipulate to it, so I would propose, if agreeable to the court, that I will get in touch with the agents of the vessel that Mr. Hilligoss is expected to come in on and if by any chance it comes in earlier than the expected time—

The Court: Is there any objection to going over, Mr. Hall?

Mr. Hall: No, your Honor.

Mr. Mack: I could perhaps get the man up here tomorrow afternoon if the boat gets in on time. Otherwise, I would suggest Friday morning.

The Court: The clerk tells me that I have something on Friday morning. I have a pre-trial in a patent case. I will probably finish with that in the morning. It might be that you could get your witness here tomorrow afternoon?

Mr. Mack: That is right. If I can, I will. I hesitate to make any definite statement because I have seen it happen when a boat is supposed to come in and gets in later. Usually it is earlier.

Mr. Hall: I am perfectly agreeable to coming up any time counsel may call me if that is agreeable to the court. [202]

The Court: I think we should make an order of continuance until Friday at 2:00 o'clock with the reservation that if counsel can agree on an earlier hour or some time

Thursday afternoon, they shall get in touch with me and I think it can be arranged.

Mr. Mack: Very well, your Honor. May I ask Mr. Hicks about two more questions, please?

The Court: Yes.

R. J. HICKS,

recalled as a witness by and on behalf of the respondent, resumed the stand and testified further as follows:

Direct Examination

(continued.)

Q. By Mr. Mack: Mr. Hicks, when discharge of the diesel alone was commenced at 9:30 on the evening of April 23rd, was the diesel discharged at a constant rate until discharge was concluded the following day?

A. It was probably, after the first half hour of discharge and before the first hour of finishing.

Q. And what would be the differential in the first half hour and the last finishing hour?

A. Oh, a couple of hundred barrels an hour.

Mr. Mack: I think that is all.

Mr. Hall: No questions.

(Witness excused.)

The Court: Have either one of you any evidence besides the testimony we are waiting for? [203]

Mr. Mack: I have none, your Honor.

Mr. Hall: There is one question that I don't know whether it calls for comment or not, your Honor. Paragraph 34 of the Charter Party reads as follows:

"Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder."



May I inquire whether your Honor, in the event there is a judgment ordered for the libelant, would fix attorney fees without proof of the services the attorneys have performed, or whether your Honor will desire proof or some statement along that line?

The Court: Well, I have never had that situation presented to me in this way. As I understand the rule, though, and I am not sure I am correct, it is that when the court has heard the evidence and has observed the services of counsel, that the court can then proceed to fix the attorney fees. Now, if counsel desire to offer any evidence as to the time that this case has required outside of the court room, and of course I realize from the briefs that there has been considerable research work done on this case, why, I would have no objection to the introduction of that evidence.

However, I presume that counsel, on account of representing opposing interests, could agree on what is a reasonable attorney fee, if it wasn't for the fact that they were [204] binding their principal, and particularly in view of the fact that the United States is a party here, I presume it might be better to offer some evidence so that we will at least have something in the record.

Mr. Hall: Very well. I will prepare a statement of that kind or be prepared with something of that sort at the next session.

Mr. Mack: I wasn't aware that a claim of that kind was being made, and of course there is no specific allegation of that in the libel unless it is under the broad prayer there.

Mr. Hall: The prayer is very broad and also, as I understand the rule in Admiralty the court is very liberal with respect to matters prayed for. There might be



recovery in excess of the amount prayed for in Admiralty.

The Court: I understand the court can allow amendments to comply with the proof too.

Mr. Mack: That is right. There is no doubt about the rule being a broad one.

The Court: Mr. Hall, I am asking some questions now because it seems to me that the case has been pretty well briefed and I doubt whether there is much more than can be submitted to the court in the way of law except on this question as to whether the respondent is liable for the contaminated products in their own tanks. I was wondering if, while you have asked for it all, whether, in view of paragraph 7, you still maintain that position. [205]

Mr. Hall: Yes, your Honor. Your Honor has had an opportunity, I assume, to examine our reply brief that came in three days ago on this damage point?

The Court: Yes.

Mr. Hall: Now, turning to paragraph 7 of this Charter Party, our position is this. The only sentence, I think, in the paragraph which is pertinent to the present inquiry, is the first sentence which reads as follows:

“The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the vessel at the expense of the vessel, but at the risk and peril of the vessel only so far as the vessel’s permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee.”

The purpose of that is obviously to limit the time and place where the vessel will be liable for a breach. In the case at bar we take the position that the breach occurred

on the vessel, and we believe we have proved that the breach occurred on the vessel. In other words, the commingling occurred on the vessel. Therefore, having proved that the breach occurred on the vessel, we have satisfied that sentence of paragraph 7. We bring ourselves within that sentence. The vessel is liable for the contamination.

Now, the next question is, what are the damages which we [206] are entitled to as a result of that contamination? The breach having occurred where this paragraph says the breach must have occurred in order for us to recover, we then have the further question as to the amount of damages which should be recovered, and there the cases cited in that recent memorandum of mine become important.

There, I show that it would be a reasonable anticipation by anybody connected with the tanker business that these products would have to go into a shore tank, and it would be foolish to assume that that shore tank would be an empty tank. It might just as well be a full tank or a partly full tank for this product to go into, and therefore it would be reasonably anticipated that the breach which occurred upon the vessel would have its repercussion in damages upon the shore.

The Court: There wouldn't be any question in the court's mind in that respect if it wasn't for the language of Article 7, because it is their libel through the Charter Party agreement.

Mr. Hall: Now, if your Honor please, I don't think there was any such evidence.

The Court: There has been testimony to the effect that the Charter Party drawn by the Standard Oil—of course, I recognize that it states here that it is a form.

Mr. Hall: Oh, no. This Charter is prescribed under the rules and regulations of the War Shipping Board. We couldn't possibly have prepared this Charter. I think Mr. [207] Mack will bear me out on that. The things that were prepared here, or filled in, your Honor is thinking of the bills of lading which were filled in by the master in San Pedro, but not the master charter.

The Court: I am discussing this a little bit because I would like, when we finish Friday, that the case stand submitted without asking for further briefs because counsel have spent considerable time and effort in that respect and have very thoroughly prepared the subject.

However, paragraph 7 reads:

"The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the vessel at the expense of the vessel, but at the risk and peril of the vessel only so far as the vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee."

Now, that looks to me as though that is a definite limitation of the liability of the vessel: that after it leaves the hose of the vessel, what the shipper does with the oil is no longer a responsibility of the vessel, and the fact that the Standard Oil officials or inspectors were constantly testing at that point would bear that out, that they were assuming their responsibility.

Now, under this setup it might ship in a few hundred [208] barrels of oil and destroy a million barrels, or a whole tank, and it seems to me that that section has been inserted in there to limit the liability of the ship to the cargo itself.

Ordinarily a product that is shipped is not commingled with another product. In other words, it might be bales



of cotton. If it was destroyed or injured, the liability would be limited to the injury or destruction of that particular cargo, and the usual measuring of damages has been fixed as the value of the cargo itself. Of course, I realize there are exceptional cases, and those you mentioned in your supplemental reply brief.

Mr. Hall: May I put it this way, if your Honor please. This sentence deals with damage to the cargo. If the damage occurs on the vessel, the vessel is liable for that damage. If the damage to the cargo here had occurred after the cargo had reached the shore, the vessel would not be liable for the damage.

Now, we have in this case the first instance. We have the damage on the vessel. That is as far as this sentence goes. The sentence is put in here to determine when the damage must occur for which you can recover for the damage to the cargo.

The cargo being damaged on the vessel, then the question arises as to what, if any, further damages were directly caused by that breach, and we turn to this paragraph 34 which must be read with paragraph 7: "Damages for breach of this [209] Charter shall include all provable damages."

Suppose that the vessel had tied up at the wharf and through the negligence of someone on the vessel, the Standard Oil gasoline had caught fire. Certainly the vessel's owners would be liable for that negligence, and when you came to the determining of the damages, they would be liable not only for the loss incurred on the vessel, but if the fire spread to the shore and the shore tanks, they would be liable for that damage and so, we say here, that the breach having occurred where it did, where it must have to enable us to recover at all under paragraph



7, the next question under paragraph 34 is: What were the damages which reasonably and naturally ensued from the breach which did occur on the vessel, and those damages were certainly to go to the product in the tank already when this product was run into the tank.

The cases I have cited in my memorandum I believe are directly in point on that, and I believe that this was the kind of damage that was contemplated by paragraph 34 here.

The Court: I don't know how they kept this type out of court as long as they have, at least out of the reported decisions.

Mr. Hall: I think I can explain that. It is because before the war, your Honor, these cargoes were carried by the oil companies themselves and when a mixture occurred, the company did not sue itself. However, since the war, the whole tanker business has been changed around and the [210] companies are operating, many of them, as general agents for the government, operating tankers for the government, and the cargo in many cases is no longer owned by the operators of the tankers.

Those damages to the product in the shore tank must be reasonable damages to be included here under the rule of the cases I have cited in my memorandum.

They say the Keystone Company was operating tankers for petroleum products, and to then assume that this tanker might reasonably assume that the products of that tanker would always be delivered into an empty shore tank is just too violent an assumption to be reasonable.

The Court: You gentlemen can get in touch with me when your witness is available, either tomorrow afternoon or Friday afternoon.

Mr. Mack: I want to say, your Honor, that I expect to have a memorandum or a supplemental memorandum on the damages probably by tomorrow, and I can only just say this, as suggested in my brief. Just suppose a situation like this, and I understand from Mr. Kilbourn that diesel oil fumes are detected in but a comparatively small amount of gasoline.

Suppose you have 1,000 gallons of gasoline run off a ship, by mistake contaminated to some degree, and the oil company, having full control of where that was to go, put 100 barrels in a tank holding 50,000 barrels and that contaminated the whole tank. Then, for some reason, they put another 100 barrels in another tank with 50,000 barrels in [211] it, and so on down the line. You would then have a case of 1,000 barrels going off the vessel and contaminating 500,000 barrels, and it does not seem to me that it was ever intended that the vessel would be liable for the 500,000 barrels, especially in view of this clause.

The Court: 36 certainly modifies this, doesn't it? They must be construed together?

Mr. Mack: They must be construed together, that is correct.

The Court: And it must be assumed that oil delivered at the end of a hose is not going to be delivered into a bucket and carried by hand and dumped some other place. It is assumed it is going to be conveyed by a pipe line to some place.

Mr. Mack: Some place within the entire control of the oil company.

The Court: Some place within the control of the oil company. That is the only point of law that is involved in this case right now that is bothering the court. There

may be some others, but that is the only question of law that is bothering me at this time.

Mr. Hall: May I say just this additional word along that line? Your Honor has stressed the point that perhaps adopting the illustration of counsel, if this oil was placed, or 100 barrels of oil was placed with 100,000 barrels, there might have been damage to the whole 100,000. The magnitude [212] of the damage is no consideration as in these warranty cases where seed is sold with a warranty.

Now, that warranty is nothing but a contract obligation that this is a certain kind of seed. The seed passes from the control of the vendor in the seed. It goes into the hands of the purchaser. It goes into the ground, and if something quite different sprouts up, there is a recovery for the damage to the entire crop. [213]

Now, take the case cited in the Restatement of Law, not by me, but—

The Court: The 120 U. S. case?

Mr. Hall: Yes, the difference there was the difference between the price of good clean rags and the price of diseased rags. The diseased rags were sent under the buyer's contract, but came into contact with the buyer's workmen, causing their death or disability, for which the owner was made liable and recovery was permitted.

There was a very much greater damage in magnitude there.

The Court: I realize that, but that case, I think, can be distinguished from this in that there was a latent defect while this defect was one that was sensible of ascertainment or might have been by closer sampling.



Mr. Mack: I think they did the best they could under the practice then prevailing which was to unload this ship as reasonably speedily as possible.

The Court: I know, but the sampling followed about once an hour. I think the testimony was that they sampled twice, but I think the set-up was to sample about once an hour.

Mr. Hall: That is right.

The Court: Now, that meant they only had an opportunity as ascertain what they were getting once an hour. Now, particularly so far as the gasoline is concerned, the moment that there had been any contamination of gasoline, counsel, [214] examination would have brought that out: while with the rags there was disease and it was latent. There was no way of ascertaining it except perhaps with chemical tests. However, this was perceptible to the eye as soon as the color changed.

Mr. Hall: Well, it certainly is not the rule of law that the Standard in this case, the libelant, in the position of the buyer, must be held to take precaution against a breach of contract on the part of the other party. That is not the rule of law. Once the breach has occurred it is our duty to minimize damages, yes, but until the breach has occurred we are under no duty so far as any case that I have been able to find where we must detect a breach on the part of the respondent.

Now, we perhaps did test at the wharf, but there is certainly no rule of law requiring us to test there. We had a right to rely on the faithful performance of this contract by the respondent. As soon as we found out there was contamination, yes, certain duties came in there that we must minimize the damage, but there is no



rule of law requiring us to anticipate a breach or to step out and spend money and time to try to detect a breach.

The Court: Another question occurs to me. It is the rule that the costs are not recoverable against the United States. Do you interpret this provision under which the United States is made a party in this action, that that also constitutes a waiver of costs? [215]

Mr. Hall: I am not prepared on that, your Honor. I am sorry. I know that the statute provides for interest against the United States limited to \$4,000.00, but I don't recall the rule as to costs.

Mr. Kaapcke: I think costs are allowable in the government under this Act.

The Court: I am rather inclined to think so because the government, so far as this proceeding is concerned, is in the same position as the principal party, but I have also in mind the other particular provision of law that costs are not recoverable in a suit against the government.

Mr. Hall: We will look into that. There is one other point mentioned by your Honor yesterday, and as having some possible bearing on that, I would like to cite two additional cases. One of them is Southern District of California, and one of them is a Ninth Circuit case.

These cases are cases that deal with possible doubt as to the cause of the damages as I think we have in the case at bar. The Court resolved the situation in such manner as to say that one thing might have caused this damage and another thing might have caused this damage and both things were under the duty and jurisdiction of the respondent.

The Court: What case is that?

Mr. Hall: The Arakan 11 Fed. (2d) 791. San Rafael Freight & Transfer Company v. Columbia Steel Corporation, 33 Fed. (2d) 895. [216]

Mr. Mack: On the question of interest, if the Court please, even though the statute provides for it, it also provides it is within the discretion of the court as is the usual Admiralty practice.

The Court: Well, of course, the theory upon which interest is allowed is the theory that that is the value of the money that they have been delayed from receiving, and if the libelant is entitled to recover in this case I certainly feel that from April, 1943, until January, 1945, that the respondent hasn't any right to the free use of that money.

Mr. Mack: That is within the Court's discretion. Sometimes they don't award it. I just call that to the Court's attention.

The Court: I think under the type of action where it is possible to definitely ascertain the damages, that is the direct loss.

My thought is, expressing it perhaps in advance, that whatever findings are made in this case, I want the findings to include both theories of damages so that the picture will be complete, and when Judge Denman of the Circuit Court gets hold of this Admiralty case, he will not have to send it back for retrial if he disagrees with the trial court.

This case will be continued on Friday at 2:00 o'clock p. m.

(Whereupon, on Wednesday, January 31, 1945, at 2:45 p. m. an adjournment was taken until Friday, February 2, 1945, at 2:00 o'clock p. m.) [217]

Los Angeles, California, Friday, February 2, 1945.  
2:00 p. m.

The Court: You may proceed, gentlemen.

Mr. Mack: If the Court please, Mr. Hilligos is here now, and I would like to put him on. He has just arrived.

The Court: You may proceed.

A. L. HILLIGOS,

a witness called by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: A. L. Hilligos.

Direct Examination

By Mr. Mack:

Q. Mr. Hilligos, have you been present in court during prior sessions of this trial?

The Court: The Court knows he hasn't been. This is the pumper, isn't it?

Mr. Mack: Yes.

The Court: Go right ahead and get to the gist of it.

Mr. Mack: All right.

Q. By Mr. Mack: Mr. Hilligos, what is your business?

A. Well, chief pumping. That is charge of pumping, discharging the cargo, all maintenance of cargo equipment.

Q. Are you a regularly licensed chief pump man, marine chief pump man?

A. Well, it is really not called a license. It is a [219] certificate.

Q. You hold a ticket, as they say? A. Yes.

(Testimony of A. L. Hilligos)

Q. How long have you held the chief pump man's ticket?      A. Since 1937.

Q. In going to sea, Mr. Hilligos, have you gone to sea in any particular type of ship?

A. Well, particularly tankers.

Q. How long have you been in the tanker game?

A. Well, I started in 1928 and then off and on tankers and passenger ships, and from 1933 until the present time I was in nothing but tankers.

Q. Is my understanding correct, then, from 1933 down to the present time you have spent all your time on tankers?      A. That is right.

Q. From 1933 on, what type of work have you done on tankers?      A. Pump man.

Q. Did you ever work for Standard Oil Company?

A. Yes.

Q. Which one was that?

A. Standard Oil of New Jersey.

Q. That was on the East Coast?      A. Yes.

Q. How long did you work for them? [220]

A. Well, from 1935 to 1939.

Q. How long have you been on the West Coast?

A. Since 1942.

Q. Since 1942?      A. Yes.

Q. Did you just arrive in here late last night from a voyage?      A. Yes.

Q. Mr. Hilligos, did you serve in any capacity on the S. S. Egg Harbor in April of 1943?

A. Yes, as chief pump man.

Q. Did you have any second pump man on the vessel?

A. Yes.

Q. Who was that, please?      A. Eddy Gittman.



(Testimony of A. L. Hilligos)

Q. How do you spell that? A. G-i-t-t-m-a-n.

Q. Do you know where he is now?

A. In the South Pacific.

Q. How long has he been out there?

A. 11 months.

Q. Did you ride the Egg Harbor south bound from Portland on its initial voyage? A. Yes.

Q. When did that commence, do you remember approximately? [221]

A. I think about the 12th or 13th of April. I think we took it over on the 12th and sailed the 13th.

Q. 1943? A. Yes.

Q. Now, before you sailed, had you been on the Egg Harbor any length of time?

A. Yes. I think it was the 27th of March I left Seattle to go aboard the Egg Harbor.

Q. And from the time that you were on the Egg Harbor up to the time it sailed, what were you doing, just generally?

A. Well, I was checking all the equipment that we maintain in the pump room, and the cargo, the cargo line.

Q. Does your job of chief pump man include any duties relating to installation of valves or making of repairs at sea?

A. Yes, if anything goes wrong or breaks down and we have the equipment, we repair it. On these ships we always take adequate equipment to repair.

Q. Now, on the south bound trip to San Pedro, Mr. Hilligos, do you know whether any hydrostatic or water pressure tests were conducted on the cargo line of the Egg Harbor?

A. Yes. I put one on myself, through the skipper's orders.

(Testimony of A. L. Hilligos)

Q. Will you tell us just what you did? [222]

A. Well, we tested Nos. 1 and 3 lines. That is the port and starboard line. First, we tested the starboard line, put about 125 or 130 pounds pressure with the cross-overs closed, and opened up the suctions on Nos. 5 and 6 tanks. That was to see if there were any leaks. There was absolutely no leaks there.

Then, we put it on No. 1 line, that is port line with cross-over No. 7 closed and the suctions in No. 5 and 6 tank opened, and there was no leak.

Q. Did you go down in ballast?

A. Ballast and the contaminated cargo.

Q. Now, I am talking about the initial voyage from Swan Island to San Pedro.

A. Yes. We went down in ballast.

Q. When you make those tests, do you make them with the tank full of ballast or empty? A. Empty.

Q. Did you personally go down in the vessel's tanks on the Egg Harbor yourself when those tests were made?

A. Yes. I would alternate with my second pump man. I would go down one and he would go down another one.

Q. And with respect to each tank, did you go into the tanks, clear across the two wings of the center?

A. Absolutely.

Q. Now, when you arrived at San Pedro, do you recall what cargo was loaded there? [223]

A. Yes. We took on Standard oil at San Pedro and discharged ballast alongside the dock and loaded diesel oil.

Q. Now, do you remember in which tanks the diesel was loaded?

(Testimony of A. L. Hilligos)

The Court: That is in the record.

Q. By Mr. Mack: Now, after these water pressure tests were concluded and before loading was commenced at San Pedro, did you check the cargo line valves on the Egg Harbor?

A. Absolutely. When I finished pumping ballast, why, I set the valves and then I went over them again with Captain Hogstrom, Port Captain.

Q. With reference to the No. 5 cross-over valve, did you personally set those yourself?

A. Yes. I was right there when they were closed and I sealed them personally.

Q. Were they shut tight?

A. Yes, with wrenches.

Q. Did you seal those personally yourself?

A. Absolutely.

Q. What about the No. 7 cross-overs?

A. The same thing.

Q. Now, Mr. Hilligos, on those Nos. 5 and 7 cross-over valves on the Egg Harbor, is there some kind of an indicator referred to as a "tell-tale"? A. Yes.

Q. Just tell us what that is. [224]

A. Well, it is an arrow that travels on the valve stem and has got marked on it "Shut", "Half", and "Open" in the space about a quarter of an inch apart, and when the valve is shut, why, it is down at the bottom and also near the bottom of the threads, not quite so you can make sure that the tell-tale isn't holding the valve open.

Q. Now, can you tell us approximately how many turns there are on that No. 5 cross-over valve on the Egg Harbor? A. About 28.

(Testimony of A. L. Hilligos)

Q. And if the cross-over valves were open in four or five tanks, can you tell us approximately how far open the valve would be?

A. Well, in four or five tanks, the gate wouldn't be open over a quarter of an inch. Well, I will say a quarter inch at the most because it goes in a recess of anywhere from a half inch to an inch.

Q. In other words, the gate goes down at the bottom of the pipe line into a recess of a half inch to an inch?

A. Yes.

Q. Were you present, Mr. Hilligos, at San Pedro after the diesel had been loaded when any further tests were made?

A. Yes.

Q. What was done then?

A. I and Captain Hogstrom went down in No. 4 tank, down in No. 9 tank, with the valves open to make sure there [225] was no contamination in the cargo. That is general procedure with this company.

Q. Were you down there personally?

A. Yes, I went down with him.

Q. What is the procedure that is followed to check whether there are any leaks?

A. Well, if there is any leaks, you pump it out and open the valves and let some more in to wash out the rust or accumulation underneath the valves to see if we can seat them tight, and we will wash the tank with a hand hose and let the company inspector look at the tank, and if he passes it, why, that is O.K.

Q. Now, when you went down in No. 4 tank, is there some procedure that you used to open some of the valves?

A. The suction valves are wide open, not wide open but enough so that if there is any leak it would show.  
[226]



(Testimony of A. L. Hilligos)

Q. When you were in No. 4, if there was a leak from No. 5, it would show in the No. 4. Is that right?

A. Yes.

Q. Now, did you at that time detect any leak when you were down in No. 4 on that occasion? A. No.

Q. I will ask you the same thing with respect to when you were down in No. 9 on that occasion?

A. No.

Q. If there were any leaks from No. 8 into No. 9, it would show. Is that right? A. Yes.

Q. Did you check the tanks clear across, that is, center and two wings in both No. 4 and No. 9?

A. Absolutely.

Q. Now, did you ride the vessel on up to Point Wells, Washington, after you had been at El Segundo?

A. Yes.

Q. And when you arrived at Point Wells, did you do anything with respect to the cargo line valves on the Egg Harbor before discharging operations commenced?

A. Yes. I went over the valves personally with myself and my second pump man. We set all the valves to discharge and then, when we got the valves set, why, we were ready to start discharging when the man on the dock gave us the word to— [227]

Q. Did you, at any time up at Point Wells, personally check the No. 5 cross-overs before discharging commenced?

A. Well, they were still sealed, tight on the chain and sealed, and that is all that could be done so far as checking goes. You couldn't open or close them to see if they were open or closed.

Q. Was the tell-tale down at the bottom?

A. Yes.

(Testimony of A. L. Hilligos)

Q. When you say you set the valves for discharge, what do you mean by that?

A. Well, when you load, you have certain valves open, and when you start to discharge, why, the valves have to be revised. You open some and close the other ones.

Q. In discharging, Mr. Hilligoss, say with reference to the diesel, in tanks 5, 6, 7 and 8, was the discharging from one tank across at a time or from all tanks at the same time? A. One tank across.

Q. So that if I understand you correctly, discharge would be concluded from one tank, and then you would take the next tank and so on. Is that right?

A. Yes.

Q. Is that the way discharging was done with reference to the gasoline likewise? A. That is right.  
[228]

Q. Now, did you leave the vessel, Mr. Hilligoss, up there at Point Wells during the discharging operations or before?

A. I left before. We had a little blow going in there and when we got the gangway out, why I left the vessel.

Q. About what time was that, would you say?

A. Oh, about 11:00 or 12:00 o'clock.

Q. Were you living in Seattle at the time?

A. Yes.

Q. Did you go over to see your people?

A. Yes, sir.

Q. Now, whom did you leave in charge of the pumping? A. My second pump man.

Q. With respect to your second pump man, Mr. Gittman, I think you called him, had he, to your knowledge, had any prior experience in pumping on tankers?

(Testimony of A. L. Hilligos)

A. Yes, approximately two years on another ship with me.

Q. Had he been right with you for two years on another vessel? A. Yes.

Q. Now, did you return to the Egg Harbor any time later that same day?

A. Yes, about 6:00 o'clock in the evening, why, Bob Hicks called me up and told me to come back to the ship and said there was contamination and he wanted me down there. [229]

Q. Did you then return to the Egg Harbor?

A. Yes.

Q. Did you go there from your people's place in Seattle to the vessel?

A. Yes. Just as soon as they called, why, I left. I got a taxicab and went right out to the dock.

Q. When you arrived there, whom did you see at the vessel?

A. Bob Hicks was there and those two gentlemen there.

Q. Indicating Mr. Simonsen and Mr. Kilbourn here in the court room? A. Yes.

Q. Did you at that time or at any time subsequently that evening check the valves, the cargo line valves of the ship?

A. Yes. Bob Hicks wanted me to check them right away and I wouldn't do it until Mr. Stevens got there. I wanted Bob Hicks to come down in the pump room with me, and he wouldn't go.

Q. Who was Mr. Stevens?

A. Supervising engineer of the Keystone Shipping on the West Coast while they were receiving these new ships out of Swan Island, and he was in Seattle at the time.



(Testimony of A. L. Hilligos)

Q. Did Mr. Stevens arrive some time after that time?

A. He arrived after I did.

Q. And in company with him, did you go down into the [230] pump room? A. Yes.

Q. Did anybody else go down with you?

A. I don't recall.

Q. What did you do down there?

A. Well, we checked the valves to see if they were set right, which they were. We never touched a valve in the pump room.

Q. Did you then check any valves on deck?

A. We went over all the valves on deck.

Q. I will ask you if you checked, yourself personally, the No. 5 cross-overs at that time?

A. Absolutely. They were still chained and sealed off.

Q. And did you test the No. 5 with a wrench at that time?

A. No. The way they were chained off, why, you couldn't open or close them with a wrench unless you took the chains off.

Q. Were the No. 5 cross-over valves shut tightly at that time?

A. Yes. They were shut very tightly.

Q. How about the No. 7?

A. The same way. I said you couldn't put a wrench on to open or close them, but they were shut tight originally and chained off and I didn't break the seals to check them. [231]

Q. Now, did you stay on the vessel that night?

A. Until midnight.

Q. Was pumping resumed some time later?

A. Yes. If I recall right it was resumed around between 9:00 and 10:00 o'clock.



(Testimony of A. L. Hilligos)

Q. What was done then?

A. Oh, I forget who it was, but they wanted certain ullage pumped out of a tank to wash the gangplank off, and we did, and started pumping both cargoes again and there was some commotion on the dock, and they said to shut down, it was contaminated again, so we did and we shut down a while longer and we started finally pumping straight diesel oil.

Q. You mentioned some commotion on the dock. Can you elaborate on that in any way? Did you observe anything on the dock? What do you mean by that?

A. Well, I am not familiar with Standard Oil docks, so I couldn't say, but I do know they had a hose crossed over from one pipeline to another, one header to another header and it seemed like when we were pumping for awhile, why, everything went fine.

I saw a fellow open a valve down on the dock, and a few minutes after that, we had contamination again. It is not my business to go on the dock and check to see that the valves are correct. I have got no business on the dock.

The Court: Did you determine what was the cause of the contamination? [232]

The Witness: Well, I think personally the contamination was ashore in Seattle. Somebody made a mistake ashore in Seattle. It wasn't on the ship. Either somebody made a mistake and opened the wrong valves, or they had the contaminated cargo in Seattle and figured it was a good chance to get rid of it.

Q. By Mr. Mack: Mr. Hilligoss, you were on the ship until midnight of the 23rd? A. Yes.

Q. You then left the Egg Harbor? A. Yes.

(Testimony of A. L. Hilligos)

Q. When did you come back?

A. 8:00 o'clock the next morning.

Q. And did you stay on the Egg Harbor then for any length of time?

A. I stayed on until it was finished discharging, and I think we finished discharging the following morning around 7:00 or 8:00 o'clock.

Q. That would be the discharge of all products from the boat?

A. Yes, sir.

Q. Mr. Hilligoss, during your experience as a pump man, have you ever seen valves blanked off with spectacles?

The Court: What do you call those?

Mr. Mack: Spectacles.

The Court: Don't you call them spectacle flanges?  
[233]

Mr. Mack: Yes, spectacle flanges.

Q. By Mr. Mack: Have you ever seen blanked off with spectacle flanges, valves comparable to the 5 and 7 cross-over valves in any of the tankers upon which you have worked in discharging different grades of cargo?

A. No.

Q. When you worked for the Standard Oil Company of New Jersey, did their vessels carry different grades of cargo on which you were a pump man?

A. Yes. I was on some of the ships run out of the Gulf up north carrying as high as 10 different cargoes, and we never blanked off anything. It would be impossible to get the cargo out of the ship.

Mr. Mack: You may cross examine.

(Testimony of A. L. Hilligos)

Cross-Examination

By Mr. Hall:

Q. I show you the plat marked in this case as Libelant's Exhibit 9, purporting to be the cargo piping on the SS. Egg Harbor. Your testimony is that you left the Egg Harbor at Point Wells on the 23rd of April between 11:00 and 12:00 o'clock in the morning?

A. That is right.

Q. Your testimony is that at that time valves were set for discharging the cargo. Is that correct?

A. Yes.

Q. Which tanks were you going to unload the cargo from [234] first?

A. Well, I recall it was No. 8. That was the diesel.

Q. You then had the valves set for unloading the cargo of diesel in tank 8. Is that correct? A. Yes.

Q. Now, how about the gasoline? Where were you going to unload that? A. No. 2.

Q. Did you have valves set for unloading cargo from any other tanks? A. Absolutely not.

Q. Now, you were going to unload the diesel through the line which is marked on this plat as line C, were you not?

A. No. We was going to unload through this line here.

Q. You are now pointing to the line B. Is that correct? A. That is correct.

Q. If I understand you correctly, then, the diesel from tank 8 was to be unloaded through line B. Is that correct?

A. That is correct. Wait a minute, no. It would be unloaded through this line here.

(Testimony of A. L. Hilligos)

Q. You are now pointing to line A. Is that correct?

A. Yes.

Q. Then, your testimony is that the diesel from tank [235] 8 was to be unloaded through line A. Is that right?

A. Yes.

Q. And at the same time you were going to unload gasoline from tank 2 through line C. Is that correct?

A. Yes. No, this line here.

Q. How long would it take you to unload the entire cargo in tank 8?

A. Approximately 6 hours.

Q. How long would it take you to unload the entire cargo from tank 2?

A. The same thing, 6 hours.

Q. When did you set these valves?

A. About 10:00, just before I went ashore.

Q. About 10:00 o'clock?

A. Yes.

Q. Then you went ashore shortly after 10:00 o'clock?

A. Well, by the time they got the gangway out, I think it was around 11:00.

Q. Did you leave any instructions as to changing of the valves for the unloading of the other tanks?

A. Yes, sir.

Q. Who was to do that unloading?

A. My second pump man.

Q. Your second pump man?

A. Yes.

Q. You left it for him to make the change when the [236] change was required for the purpose of unloading cargo from some other tank?

A. The man is a senior officer.

Q. Wait a minute. Will you answer that question if you understand it, please?

A. May I have the question read?

(Question read.)



(Testimony of A. L. Hilligos)

Q. By Mr. Hall: Will you please answer that question yes or no, and then you may explain it.

A. No.

Q. You didn't leave it to him? A. No.

Q. Who did you leave it with?

A. The chief officer.

Q. His name? A. Morris.

Q. Did you leave it with anybody else besides Morris?

A. No.

The Court: What did Morris have to do with it?

The Witness: He is senior officer in charge of discharging cargo. We only assist him. I tell my men, "You do this and you do that," but if the senior officer in charge wants to change it, he has got the authority to change it.

The Court: Didn't you leave any instructions with your assistant regarding switching over to the other tanks?

The Witness: I told him to switch over, yes, from No. 8 [237] to 7.

The Court: For instance, I understand from tank 8 you would pump from this line marked A?

The Witness: Yes.

The Court: How would that diesel oil finally reach your outlet? Just trace it for me.

The Witness: These master valves were closed. It would come up through here, down through here, into the cargo pumps, and finally up through this riser.

The Court: Now, about No. 8, where would it go?

The Witness: It would come straight back through here and through this pump here and eventually come up through this riser here (indicating).

(Testimony of A. L. Hilligos)

Q. By Mr. Hall: No, before you left to go into Seattle on the 23rd of April, you say you checked the valves? A. Yes, sir.

Q. All over the vessel? A. Yes, sir.

Q. When you say "checked", you mean you looked at them?

A. I do not mean I looked at them. I checked them.

Q. What do you mean by "check"?

A. Put a wrench on to make sure they are closed except the ones I want to be open.

Q. On this plat, Libellant's Exhibit 9, there are a lot of little circles shown on what purports to be the deck [238] of the vessel, on the upper half of the plat?

A. Yes.

Q. Now, before you left the vessel that morning, then, your testimony is that you put a wrench on those valves? A. That is right.

Q. All of them? A. That is right.

Q. But you didn't put a wrench on the valves in the cross-overs in the No. 5 tank, did you?

A. It was impossible. I put one on them in Pedro and made them tight and when I had them chained, you couldn't open or close them unless you broke the seal.

The Court: How do you account for the fact that they were found partially open?

The Witness: That is something I don't know.

The Court: You knew about that, didn't you?

The Witness: I didn't know about it until today.

Q. By Mr. Hall: What time did you return to the vessel from Seattle on the evening of April 23rd?

A. Approximately 6:00 o'clock, or a little after 6:00.

Q. Was there any discharging going on then?

A. No.

(Testimony of A. L. Hilligos)

Q. Were both Mr. Stevens and Mr. Hicks there at the time?

A. No. Mr. Hicks was there and Mr. Stevens arrived shortly after I did. [239]

Q. Now, as I recall your testimony, you said they started to discharge both cargoes again. Is that correct?

A. That is right.

Q. When did that occur?

A. Oh, I couldn't give you the time on it, but it was, I would say, around 8:00 o'clock.

Q. How long did they discharge two cargoes when they recommenced before they stopped again?

A. That is hard to say, too. It was approximately a half hour. I wouldn't say that was the exact time, because it has been so long ago.

Q. It might have been five minutes?

A. No, no. It was longer than that. We pumped about 10 or 12 feet out of the tank.

Q. What's that?

A. I would say we pumped about 10 or 12 feet out of the tank. It was about a half hour anyway.

Q. Were they still pumping from tank 2 and tank 8?

A. Tank 8 and tank 4.

Q. Oh. There had been a change from tank 2 to tank 4 then? A. Yes.

Q. When did that change occur?

A. When they wanted to wash out the gasoline line in the No. 4 tank.

Q. Were you there when that change occurred? [240]

A. Yes.

Q. What time did it occur?

A. It occurred just before we started pumping.

(Testimony of A. L. Hilligos)

Q. Had tank 3 been emptied?

A. That is something I couldn't say. I don't remember.

Q. Why did they pump from tank 2 to tank 4?

A. I couldn't tell you. It was talked over among Stevens, Hicks, our mate, and those two gentlemen there. They were the ones who decided why it should be done that way.

The Court: You say there was a commotion. What do you mean by that? You said there was a commotion, somebody said there was contamination and to shut down again. Is that the commotion you meant?

The Witness: We were pumping for awhile and I heard somebody holler down on the dock to open something up, and I looked over and they had a hose from one pipe line to another, and I saw this fellow open the valve and it wasn't but a few minutes after that that we had contamination again.

The Court: Well, did you see Mr. Hicks down there?

The Witness: No. He wasn't down there. He was aboard the ship.

The Court: He didn't go down there at any time?

The Witness: On the dock, no.

The Court: He didn't go down to see whether there was [241] contamination or not?

The Witness: Not to my knowledge. I couldn't say. I was on deck. He could have because he was with these gentlemen here.

The Court: So far as you know, he observed the contamination himself?

The Witness: Yes, so far as I know.

The Court: Proceed.



(Testimony of A. L. Hilligos)

Q. By Mr. Hall: What time of the day was that when that commotion occurred?

A. Well, it was shortly after 8:00 o'clock, after we had started pumping.

Q. Was it dark? A. Yes.

Q. When you say you saw somebody opening a valve, describe to us where that valve was.

A. About 25 to 30 feet from where I was.

Q. Was it on a dock header?

A. Yes, it was on a dock header.

Q. Whereabouts on the dock header?

A. Well, the pipeline runs paralalled with the dock. There was a header coming up off a tee.

Q. I asked you where it was on the header. You said the valve was on the header. Whereabouts on the header was it? A. In the middle of the header.

[242]

Q. Which header was it, the one connected with the gasoline hose or the diesel hose?

A. That is something I couldn't tell you. I told you it was a hose hooked up from one pipe line on the dock to another pipe line on the dock, and I am unfamiliar with Standard Oil docks, so I can't tell you what line it was connected to.

Q. Now, when you say a hose connected from one line to another, you mean hose and not pipe?

A. Yes.

Q. It was a hose on the dock? A. Yes.

Q. Leading from one pipe to another pipe?

A. Yes.

Q. Where was the valve in the hose, whereabouts in the pipe? A. In the pipe line in the header.

(Testimony of A. L. Hilligos)

Q. Did the hose lead from the header or from some pipe to another pipe?

A. Well, I can see you are very unfamiliar with pipe lines, but a pipe line—

Q. You enlighten me, then.

A. A pipe line has what I call a header. It has a tee coming off, a valve, an ell, a header, and a hose was hooked up to the header to the valve to the tee in the pipe line. [243]

Q. Where did the hose go?

A. To another header.

Q. On the same dock?

A. Yes, approximately 10 or 12 feet away.

Q. Did you see any hoses connected with headers leading to the vessel?      A. Yes.

Q. Were they the same headers that you have been talking about in connection with those hose from one pipe to another?      A. No.

Q. Where were you when you saw all this?

A. Standing up on deck looking right down on them.

The Court: Did you make any comment?

The Witness: Yes, I made a comment.

The Court: To whom?

The Witness: Three or four people standing around there. I don't know who they were.

The Court: Did you make any comment to the men that were connecting up the two lines?

The Witness: Yes. I asked them what they were doing.

The Court: What was the answer?

The Witness: They said, "Well, just our regular gas line." That is all that they said.

(Testimony of A. L. Hilligos)

The Court: Did you make any comment at that time that the contamination was being caused by the way they were con- [244] necting up their pipe line?

The Witness: Yes.

The Court: To whom?

The Witness: These gentlemen was standing there, and my big bosses was standing there, and I said, "I think it is coming from the tanks off shore there."

The Court: When you speak about the header on these pipe lines, you mean that portion to which they coupled on the hose to their pipe line?

The Witness: Yes, sir. That is my definition of a header.

The Court: If it was in a garden, you would call it the faucet?

The Witness: Yes.

The Court: The same thing as coupling the hose together?

The Witness: Yes, sir.

The Court: Did you notice whether there were two couplings there or just one?

The Witness: Where it came up from this pipe line that I am looking at, why, it was down the dock about 15 or 20 feet, and the Standard Oil at Point Wells, I guess there is four or five pipe lines on the dock.

Well, I never went down the dock and traced it because, as I say, it is none of my business. I have got no authority on the dock.

The Court: But you had some responsibility in that [245] respect? You knew that as soon as contamination developed the first thing they would do would be to claim that it had been contaminated aboard, didn't you?

(Testimony of A. L. Hilligos)

The Witness: Yes.

The Court: What did you do to protect yourself from the responsibility for the contamination? Did you do anything? Did you just say it was their business and let them alone?

The Witness: No. I mentioned it to Stevens.

The Court: All right. Now, the hose from the deck hooks into a pipe line like two pencils together?

The Witness: Yes, sir.

The Court: And there were two of those coming out?

The Witness: Yes.

The Court: And you claim that there was a hose connecting the two?

The Witness: No, farther down the dock. These pipe lines all run down the dock parallel, and some of them go down underneath the dock and into tanks, and further down they will go to more tanks, and down the dock about 40 feet from where our ship's *horses* was connected to the dock pipe line, there was another hose crossed from one header to another header across the pipe lines. That is where this fellow opened a valve. I saw him open a valve and close it.

The Court: You have learned that the cross-over valves on tank 5 were found partially open? [246]

The Witness: So I heard today, yes, sir.

The Court: And you know that the mate was discharged over this, don't you?

The Witness: Yes.

The Court: Yet you don't know how those valves came to be loosened?

The Witness: No, because I and Captain Hogstrom in Pedro set those valves up tight with wrenches and put



(Testimony of A. L. Hilligos)

chains on them, and when I finally broke the seals in El Segundo after the round trip, it took three men on wrenches to open them. So, that is all I can say.

The Court: That is all.

Mr. Hall: That is all.

Mr. Mack: I have a few more questions.

Re-Direct Examination

By Mr. Mack:

Q. During discharge operations on the Egg Harbor there, was any record kept by the vessel of ullages in the vessel's tanks at different intervals? A. No, sir.

Q. In other words, you started discharging and no record was kept at any time of how much was in each of the tanks?

A. No, except like when I am pumping now, we are on the South Pacific run, and when I finish a tank, we take a record of it. [247]

Q. You take a record of the time?

A. Yes. However, where we are pumping out one cargo at one dock, we never take no time except the time it started and the finishing time.

Q. When discharge of both products was commenced there within a short time of one another on the afternoon of the 23rd, was one pump discharging one product each?

A. Yes, sir.

Q. And on the Egg Harbor, what is the approximate capacity of the pumps; that is one pump?

A. Well, the pumpers say 3,000 barrels an hour, but the best I have ever been able to get out of them is around 2,800 barrels an hour.

Q. That is the maximum that you developed in your pumping experience? A. That is right.

(Testimony of A. L. Hilligos)

Q. Would that apply equally to gasoline and diesel furnace oil?

A. Yes, up to a certain pressure. Of course, the more pressure built up, the slower you are going to pump.

Mr. Mack: I think that is all.

The Court: There were a couple of spectacle flanges there that were open, were they not?

The Witness: Yes, sir.

The Court: Why were they not closed?

The Witness: Well, I can explain that to you. These [248] are pipe lines coming into the pump room. Your spectacles are here. Your pipe lines go here. Then your pipe lines continue on. Here is your sea cocks. So, you got a line running clear across the pump room. You have two valves, one here for what you would call the No. 3 line and one for the No. 2 line and No. 1 for the No. 1 line. They are individual valves.

The law will not let you blank them off, for some unknown reason. I don't know why.

The Court: Do you know why those flanges were put in there?

The Witness: I could never figure that out, sir.

The Court: You are familiar with the rulings now to the effect—

The Witness: They still have to be in there sealed.

The Court: But it is the requirement now on these government tankers that these flanges are to be set closed. Are you familiar with that ruling?

The Witness: No, I am not, but we have got the same on this ship here. Last night I was pumping out a No. 9 tank with those, and not with the No. 3 pump.

(Testimony of A. L. Hilligos)

Q. By Mr. Mack: Now, you are talking about the present ship you are on now?

A. Yes. That shows us they are not in there for absolutely any good, because I was coming right back here from another line. [249]

Q. From what you say, Mr. Hilligoss, when the spectacle flanges in the pump room are set, you can still pump around them from another line?

A. I can still go around through them.

Mr. Mack: That is all.

The Court: That is all.

(Witness excused.)

The Court: Any further evidence, gentlemen?

Mr. Mack: I want to ask Mr. Kilbourn a few more questions as my own witness.

The Court: I didn't continue this to give you a new start.

Mr. Mack: This is the end, if the Court please.

FRED R. KILBOURN,

called as a witness by and on behalf of the respondents, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Mr. Kilbourn, prior to the arrival of the Egg Harbor up there at Point Wells on April 23rd, 1943, had you had any experience with contaminated cargoes from vessels?

A. Any experience with contaminated cargoes from vessels?



(Testimony of Fred R. Kilbourn)

Mr. Hall: I submit that is immaterial, if the Court please. It is raising collateral issues. [250]

The Court: I think within a specified period—the only thing we are interested in was April. I presume your question was directed to the witness to show that the tanks were already contaminated?

Mr. Mack: No. My idea was to show if they had any experience with it before, and charge them with knowledge of what they should do when they first learned of a contamination coming off the vessel.

The Court: You may answer the question.

The Witness: Yes. I think we had one about 1939. There was a cargo of road oil come up, and if you understand road oil MC2, it is a cut back, and SC2 is shipped up. MC2 is put in an SC2 tank, but the master gauger was not directed until we got information from the home office some three days later that the SC2 was shipped up north and the MC2 or vice versa. However, that was something put in the wrong tank. That was a contamination caused by putting one on top of the other.

The Court: Did you ever have a condition where a tanker arrived and the product was contaminated?

The Witness: No, sir. I never had one.

Q. By Mr. Mack: Not prior to this occasion?

A. No.

Q. But in your experience in the oil industry you have heard of that happening, haven't you?

The Witness: Of a boat being contaminated? [251]

Q. Yes. A. No. I never have.

Q. That is prior to the Egg Harbor?

A. No. The first one I run into was the Egg Harbor.



(Testimony of Fred R. Kilbourn)

Q. Now, can you give us an idea, Mr. Kilbourn, on this plat of your layout up there, how far it is from the dock over to the gasoline tanks 61 and 62?

A. Oh, I would say I imagine it is 2500 feet, and maybe 3,000.

Q. The gasoline lines that are depicted on here in red, are those underground or surface? A. Surface.

Q. All surface?

A. All surface except they are under docks here, and come on the surface all the way. We have all of our lines on the surface so we can detect any leaks.

Q. With reference to the blue lines indicated on this plat No. 1, how far is it from your dock up to tank 8?

A. Oh, I would say it is around 7 or 8 feet.

Q. How far to tank 41?

A. Oh, I would say another 7 to 8 feet. It is kind of a round about way.

Q. Are those diesel lines surface or underground?

A. The only place it is underground—it is all on surface except—no, by George, they are all above ground.

Q. What is the terrain there? Is that all level or [252] on hills?

A. No. It is dredged land. It is sandy dredged land.

Q. Mr. Kilbourn, is my understanding correct that prior to discharging operations commencing from the Egg Harbor, you had taken no samples from shore tank No. 8? A. No samples from shore tank No. 8.

Q. And you had made no tests from shore tank 8?

A. No.

The Court: You say you had been making regular deliveries?

(Testimony of Fred R. Kilbourn)

The Witness: Yes. Two days prior, we had finished pumping those tanks. We pumped down to what we call bottom.

The Court: Those were storage tanks and you continued to use them and fill the orders of your customers from those tanks?

The Witness: That is right.

Q. By Mr. Mack: The same is true on the samples or tests not being taken before discharge relative to gasoline in shore tank 62? A. That is right.

Q. Now, is my understanding correct that from the time you or the men under your supervision first started to take samples of the diesel which continued, as I understand it, all through the night of the 23rd and the following day, they never detected from any of the samples or tests that they made that anything was wrong with the diesel? [253] A. That is right.

Q. Now, have you changed that method of sampling and testing since the Egg Harbor?

A. No, but we do—we go aboard the boat and take samples of what we call “outside boats” since the Egg Harbor and make flash tests of the diesel that is in the tanks of the boats that come in there but we still control the dock deliveries by sample by vision.

Q. Well, what was the purpose in taking the samples then as you did after discharge commenced relative to the diesel?

The Court: You only put your hand on a hot stove once, and you learn after that not to put it on again, counsel.

Mr. Mack: That is true, your Honor, but I have been trying to figure out if the samples didn't help them any, what was the purpose in taking them?

(Testimony of Fred R. Kilbourn)

The Witness: May I say on that that the gasoline is a slightly different color than the diesel and that was the only thing we were worrying about. We watched to see if there was any chance of gasoline going in there and we could catch it, but in making a slight mixture as they did in that case, the quantity of gasoline wouldn't show up in the diesel.

Q. By Mr. Mack: So far as the gasoline was concerned, you readily detected the change in color?

A. Yes. A larger percentage of diesel went into the gasoline than did the gasoline into the diesel. It was quite [254] brown. It looked almost like diesel.

Mr. Mack: That is all.

#### Cross-Examination

By Mr. Hall:

Q. Did you at that time have a hose on the dock for the purpose of connecting any of these pipe lines on the dock?

A. I don't know whether we had one at that time or not, but we often do have a hose from what we call our 16-inch line to our 8-inch line in case we are loading a small cargo vessel from that dock line. Then, we put it from one header to another on our gasoline line. We may put a line across here. There are two gasoline lines there. They are absolutely separate. We can go around here to a vessel down here, but there is so much back pressure running through the pump that we oftentimes put a cross-over line from one header to the other down here to take the cargo down here.

Q. Then that cross-over by means of the hose would be from one gasoline to another gasoline line?

A. Yes.



(Testimony of Fred R. Kilbourn)

The Court: What would prevent you from using that same *house* to connect up the diesel oil with the gasoline?

The Witness: That is something we watch out for. There is a decided color in the header.

The Court: It is the same size pipe?

The Witness: Yes, the same size pipe, 6-inch header but with a red head with gasoline and a decided green head [255] for diesel, and at this point there is no diesel header near that gasoline cross-over valve.

The Court: How far is the one—

The Witness: I imagine it was 30 or 40 feet. That is used quite often. For that matter, we leave the hose there in case of a boat coming in so we can pump from this big cargo line. We can draw up here in case of a little boat coming in and we could run it up through the pump house. However, I don't remember any hose there at this time.

The Court: Were you there in the evening at the time that the pumper returned and they started up the second time?

The Witness: I was there until way after midnight.

The Court: Did you see any connecting hose used between the lines?

The Witness: I don't know whether the hose was there, because we often have it there.

The Court: Did you see it in use?

The Witness: I don't remember.

The Court: You would know whether it was being used to connect up one line with another?

The Witness: I would, but I can't remember this special one.



(Testimony of Fred R. Kilbourn)

The Court: I know, but you heard the pumper's testimony. What do you know about that fact? He said he saw somebody, and in your presence, make that connection that caused the contamination. [256]

The Witness: The connection would be made prior to the pumping of the boat. It would remain there until the boat got through pumping, if there was any connection made.

The Court: You couldn't make it while the pumping was going on?

The Witness: Yes, if we turn off a valve, but that was on at the time.

The Court: This witness has testified that he saw some of your men deliberately connect up the diesel line with the gasoline line.

The Witness: That is wrong.

The Court: Do you know that to be a fact?

The Witness: Yes, I know that to be a fact.

The Court: How do you know it?

The Witness: It wouldn't affect the test of contamination if it was connected up that way, your Honor.

The Court: You mean the test was taken before it reached that point?

The Witness: Yes.

Mr. Hall: I was about to ask him that, but I think it was clear that the tests were taken at the end of the ship's hose before it reached the first header on the dock.

The Witness: Yes.

Q. By Mr. Hall: And those were the tests taken when they resumed pumping of the double cargo of both products at 9:30 or whenever it was? [257]

A. That is right.

(Testimony of Fred R. Kilbourn)

The Court: And you make the test at the point where your hose couples on to the ship's connections?

The Witness: We make it where our hose coming from the ship down to the header before it goes into the pipe line, and that is as the gas comes directly from the boat, before it gets into our pipe line.

The Court: And there is no way to make a connection there with another line?

The Witness: No, absolutely not. The connections are made 60 to 70 feet from these risers as they come off the boat.

The Court: Any further questions?

Mr. Hall: No.

Mr. Mack: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Any further evidence, gentlemen?

Mr. Mack: The respondent has no further evidence.

Mr. Hall: The other day your Honor asked if we would prepare a statement with respect to attorney fees. I have handed counsel a copy of this statement, and I believe that he will stipulate that if a member of our firm were called, that member would testify in accordance with this memorandum which I have now filed with the clerk, which is labeled Schedule C. [258]

Mr. Mack: Of course, I was handed a copy of this statement by Mr. Hall just before the court convened this afternoon and looked it over hastily.

I will stipulate that if Mr. Hall, who is a member of their firm, were called, he would so testify subject, however, to my objection to any evidence relative to attorney fees.

The Court: Well, that is a point of law that we will settle afterwards.

Mr. Mack: I am just making the objection for the record, if the Court please.

The Court: The Court will take that into consideration.

Now, Mr. Mack, you were going to check the figures on Schedules A and B so that you would be in a position to ascertain whether you have any objection to the method of calculation set forth.

Mr. Mack: I looked those over, if the Court please, and I would want to ask Mr. Hall a couple of questions about them because it wasn't quite clear to me the way they were figured. In other words, I didn't know, and what I am interested in is whether those are actually the accountant's figures as to costs on the reduced amounts, or whether it is a percentage proposition. I wasn't clear.

Mr. Hall: Those are the accountant's figures. The only percentage figure, as I understand it, is in the item with respect to handling charges at Point Wells in Schedule B, which is an item of \$335.00 on this schedule, and in our [259] stipulation of December 6, 1944, it was \$400.00 odd dollars. Now, that has been prorated.

All other items on Schedule B are accountant's figures kept in the same way that the group figures were computed in paragraph 7 of our stipulation of December 6th.

Mr. Mack: I have been all over those figures in great detail before the trial, and on Mr. Hall's statement that that is the fact I am willing to agree to it, namely, that the proper witness, if called, would testify to those figures there in Schedule B.

Mr. Hall: Will that be given an exhibit number, if the Court please, this Schedule C which I have just handed in?

The Court: It may be next in order.



(The document referred to was marked Libelant's Exhibit 15, and was received in evidence.)

[LIBELANT'S EXHIBIT NO. 15]

SCHEDULE C

STATEMENT RELATIVE TO THE SERVICES  
RENDERED BY THE FIRM OF LAWLER,  
FELIX & HALL, AS ATTORNEYS FOR LI-  
BELANT IN STANDARD OIL COMPANY OF  
CALIFORNIA V. UNITED STATES OF AMER-  
ICA, ET AL—FEDERAL DISTRICT COURT  
NO. 3490-BH

The services of libelant's attorneys were rendered over a period beginning March 6, 1944, on which date information that the vessel SS "Egg Harbor" had arrived or was about to arrive at the Port of San Pedro, necessitated that a member of the firm devote his exclusive and prompt attention to the filing of a libel in order that the suit might be commenced while the vessel was in port and within the jurisdiction of the Court.

The libel was prepared on March 6 and 7, 1944. Filing and arrangements for service of process was accomplished on March 7, 1944. Thereafter during each month prior to trial, except June 1944, services were performed in the nature of trial preparation by either John M. Hall or Marcus Mattson, both members of the firm.

Prior to the commencement of the trial the time spent upon the case was 268¼ hours, exclusive of the time spent in telephone conversations and in the preparation of correspondence. Such time was taken up with preparation of pleadings and other papers, conferences with counsel for respondent and with witnesses and others



(Libelant's Exhibit No. 15)

having knowledge of the facts, examination of correspondence received and examination of authorities.

While the necessity of presenting certain evidence through testimony of witnesses was obviated by stipulation, it was necessary prior to obtaining said stipulation to obtain and have available a great deal of documentary matter in order that a proper basis for such stipulations could be shown to exist.

The preparation and filing of an extensive pre-trial Memorandum for the guidance of the court was undertaken in view of the questions of law involved. While the basic principles involved cannot be said to be new or novel, their application to the case was not entirely simple because of the lack of decisions pertaining to the factual situation which gave rise to libelant's claim. In addition to such Memorandum, an additional Reply Memorandum was prepared prior to trial.

Preparation of the factual portion of the case required trips to San Pedro and El Segundo.

A tabulation of the total time of  $268\frac{1}{4}$  hours spent prior to January 30, 1944 discloses the following:

Preparation and filing of Libel in Personam	5½ hours
Conferences	28 "
Research and examination of authorities	234¾ "
	<hr/>
	268¼ hours
Number of telephone calls	60
Number of letters	47
Number of court appearances prior to trial	2

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 15. Filed Feb. 2, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Mr. Hall: I desire, if the Court please, to file a supplemental memorandum of authorities dealing with three points. First, that the Charter party must be strictly construed against the United States, and under that point I call your attention to the fact that the form of this Charter party is prescribed in the Federal Register. If the Court desires that, I have the number of the Federal Register here and I will hand it in.

The second point in this memorandum is my argument with reference to paragraph 7 of the Charter party and I ask consideration of a further contention made with respect to [260] paragraph 7 over and above the contentions which I offered in argument the other day.

The third point has to do with the question of attorney fees and the propriety of an allowance against the United States on account of attorney fees. Under that point I have called attention to the authority of the War Shipping Administration under the Act and under the Executive Order of its creation and to comment upon that authority in two opinions of the Attorney General of the United States which I think have a bearing upon the general question of the allowance of those attorney fees.

The Court: I haven't read it all, but I notice here you have given a statement as to the time spent in this case, but is there going to be any testimony as to your opinion as to what is a reasonable attorney fee?

Mr. Hall: I would leave that with the Court.

The Court: But you must remember that I am just a country lawyer and my idea of fees differs considerably from those of you that live in a big city. If I allow attorney fees, I would be basing them on my experience as a country lawyer and it would be to your disadvantage.

I would like to at least have testimony or a stipulation that he would testify that a certain amount is in his opinion legal.

Mr. Hall: My testimony would be that \$9,000.00 would be a reasonable fee. May it be stipulated that if called I [261] would so testify, Mr. Mack?

Mr. Mack: Yes, so stipulated.

The Court: I presume you will want an opportunity to examine this supplemental brief?

Mr. Mack: And on that question of attorney fees, I haven't had much chance.

The Court: I will give you five days to submit any authorities that you desire to submit in reply. Pretty near everything else has been covered as we have gone along.

I appreciate the way in which both sides have presented their case freely and frankly, and the co-operation between counsel.

The Court has in his own mind most of the questions of law worked out, whether they are right or wrong. I have come to some rather definite conclusions of certain questions of law in this case and probably should make no comment until I have read the authorities. However, I can't figure out under what authority attorney fees can be obtained against the United States in view of the fact that this Act under which this proceeding is brought is strictly construed and the matter of allowing costs and interests is definitely stated.

Now, it seems to me that that expression is in there as a limitation of the authority of this court. Of course, you may have answered my comments in this statement or this



additional memorandum that you have filed, but your only authority to sue the United States, as we have proceeded in this case, [262] and jurisdiction to sue, is based upon Section 741 of Title 46. Now, you state that the Attorney General and the Shipping Board have made certain rulings in that respect in other cases?

Mr. Hall: I don't want to repeat anything I have in my memorandum, but for clarity in approaching the question, may I make this distinction? We are not asking for attorney fees as a matter of costs or as being included in the costs. We are asking for them as an element of damages. There is a very marked distinction between the two, I concede.

In this case the attorney fees should be awarded as part of the judgment because they are granted by the contract itself if there is a breach.

The Court: In other words, it is a part of the damages.

Mr. Hall: Yes, the same as a promissory note or a lease or something of that sort. We go from there to inquire as to the power of the War Shipping Administration to make this kind of a contract, to contract that if there shall be a breach, attorney fees shall be included, and I mention that authority in the memorandum I submitted.

The Court: I would like to have the Federal Register memorandum on that Charter Party agreement. I have it in my library but of course I haven't the citation.



Mr. Hall: I cite it in my memorandum. It is June 10, 1942, page 4386.

The Court: Is there anything further, then, gentlemen? [263] The matter will stand submitted, but I will allow you, Mr. Mack, five days to file any reply you desire to Mr. Hall's memorandum that has been filed today, and if you desire to file a reply to the one that he served on you within five days, you will have the same privilege.

Mr. Hall: Thank you, sir.

The Court: But we have used a lot of paper so far in this case, so I am not asking for it.

Very well.

[Endorsed]: Filed Jul. 16, 1945. [264]

[Endorsed]: No. 11126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Standard Oil Company of California, a corporation, Appellee. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 13, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11126

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT  
INTENDS TO RELY ON APPEAL

Appellant, United States of America, intends to rely upon the points stated in its Assignment of Errors on appeal herein, which Assignment of Errors appears at page 69 of the typewritten Transcript of Record as certified by the Clerk of the District Court, and appellant incorporates its Assignment of Errors and full contents herein the same as though fully set forth at length.

Dated: August 28, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Appellant

Received copy of the within Statement of Points on which Appellant Intends to Rely on Appeal this 28th day of August, 1945.

LAWLER, FELIX & HALL  
JOHN M. HALL

By John M. Hall

Proctors for Appellee

[Endorsed]: Filed Aug. 30, 1945. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND REQUEST FOR USE OF  
CERTAIN EXHIBITS IN ORIGINAL FORM

It Is Hereby Stipulated between appellant and appellee, through their respective proctors, that the exhibits hereinafter specified may be used and considered by this Court in their original form, which exhibits cannot very well be printed, namely:

(A) Libelant's (appellee's) exhibits as follows:

- 1) Exhibit 1—Layout at Point Wells, Washington.
- 2) Exhibit 8—Cargo Plan of S. S. "Egg Harbor".
- 3) Exhibit 9—Piping Arrangement.
- 4) Exhibit 10—Wooden Model of Spectacle Flange.

(B) Respondent's (appellant's) exhibits as follows:

- 1) Exhibit A—Smooth Log of S. S. "Egg Harbor".
- 2) Exhibit B—Rough Log of S. S. "Egg Harbor".
- 3) Exhibit C—Ullage Sheet, Voyage 2, S. S. "Egg Harbor".
- 4) Exhibit D—Ullage Street, Southbound Voyage, S. S. "Egg Harbor".

Dated: August 28, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS  
A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Appellant

LAWLER, FELIX & HALL

JOHN M. HALL

By John M. Hall

Proctors for Appellee

#### ORDER

It is so ordered.

Dated: August 31st, 1945.

FRANCIS A. GARRECHT

Presiding Judge

[Endorsed]: Filed Aug. 31, 1945. Paul P. O'Brien,  
Clerk.



No. 11126

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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CHARLES H. CARR,

*United States Attorney,*

ROBERT E. WRIGHT,

*Assistant United States Attorney.*

ELLICK, GEARY, McHOSE & ADAMS,

AUGUSTUS F. MACK, JR.,

634 South Spring Street, Los Angeles 14,

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No. 11126

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### I.

#### STATEMENT OF PLEADINGS AND FACTS.

Appellant, United States of America, is appealing from the final Decree of the United States District Court, Southern District of California, Central Division, entered March 16, 1945. The case is one in Admiralty and was tried before the Honorable Ben Harrison, Judge presiding. The statement of statutory provisions, pleadings and facts under Rule 20 follows.

A.

**Statutory Provision Believed to Sustain the  
Jurisdictions.**

The case was initiated, tried and handled throughout under the Suits in Admiralty Act 46 U. S. C. A. 741-752, which Act provides specifically for libels *in personam* against the United States in cases of this character. The libel itself made specific reference to the fact that it was filed under the provisions of the Suits In Admiralty Act (page 4). It is clear, therefore, that the District Court had jurisdiction.

This Court has jurisdiction upon appeal to review the final decree in question under the general appeal statute 28 U. S. C. A. 230, which applies to final decrees in Admiralty.

B.

**Pleadings Necessary to Show the Existence of the  
Jurisdictions.**

Libel *in personam* was filed in the District Court in accordance with the Suits In Admiralty Act and the libel, Paragraph 5, makes specific reference to the Act. The libel appears at pages 3-6 of the record. In brief, the libel alleged the operation of the S. S. Egg Harbor as a merchant vessel by United States of America by and through War Shipping Administration, the making of an agreement for the carriage of petroleum products on the S. S. Egg Harbor with Standard Oil Company of California, the loading and carriage of the products from San Pedro and El Segundo, California to Point Wells, Washington, the commingling and contamination of a portion of the products and resultant damage claimed.



Amendment to Paragraph 9 of the libel was allowed by the Court and it appears at pages 22-23 of the record. An amendment to the libel to conform to proof was allowed by the Court, the amendment being designated as a new Paragraph 12 of the libel, and a new prayer was permitted, designated as Paragraph 4 of the prayer—these appear at page 42.

Appellant, United States of America, answered the libel admitting certain allegations and denying the substantial allegations of commingling and damage resulting. The answer also set up two affirmative defenses alleging that the carriage of goods in question was pursuant to Tanker Voyage Charter Party Form 104 of War Shipping Administration, whereby Standard Oil Company of California chartered the S. S. Egg Harbor for carriage of a cargo of gasoline and diesel oil; that paragraph 19 of the charter party was a defense to any commingling or contamination by reason of its provision excusing the Vessel “for any consequences arising out of shipping more than one grade of cargo.” The second affirmative defense set up was under Paragraphs 7 and 20(a) of the charter party alleging that if the cargo was commingled or contaminated, it arose “without the actual fault or privity of the Owner” in a pumping operation within Paragraphs 7 and 20(a) of the charter. The answer appears at pages 7-13.

Respondent, Keystone Shipping Company was not served, did not appear, and the libel was dismissed as to it at the inception of the trial (pp. 21 and 69).

Findings of fact and conclusions of law are found on pages 43-50 and the final decree at pages 51-53.

Order allowing appeal to the United States Circuit Court of Appeals for the Ninth Circuit was entered by the

District Court well within the three months time permitted under the statute, the Order appearing at page 59, and Petition for Appeal at page 58. Assignment of Errors was filed at the same time, and appears at pages 59-62 of the record.

We believe that the jurisdiction of the District Court and of this Court on appeal is clearly evident from the recitation of the pleadings.

### C.

#### Statement of Facts.

The facts are comparatively simple, and there is little dispute over them. The principal difficulty in the case has been the construction of the Voyage Charter Party Form 104 and law applicable to the questions involved.

In April, 1943, construction of the S. S. Egg Harbor, a Tanker, was completed at Portland, Oregon, for the appellant, United States of America. It was what is known as a Swan Island Tanker, with a capacity of 135,000 barrels in nine cargo tanks. The vessel sailed south on its maiden voyage in ballast, under command of Captain Lawrence C. Olsen, bound for San Pedro, California, there to load a cargo of gasoline or diesel oil for appellee, Standard Oil Company of California, pursuant to Tanker Voyage Charter Party Form 104 of appellant, dated April 14, 1943, for the full capacity of the Vessel.

60,933.31 barrels of merchantable diesel oil were loaded on the S. S. Egg Harbor at San Pedro on April 17, 1943, in tanks Nos. 5, 6, 7 and 8. On the following day, April 18, 1943, 63,789.52 barrels of merchantable gasoline were loaded at El Segundo in tanks Nos. 2, 3, 4 and 9. Tank No. 1 was not used.

The S. S. Egg Harbor then proceeded on her voyage north to Point Wells, Washington, this being located some fourteen miles north of Seattle. It arrived there during the early morning of April 23, 1943, in a howling gale, and it was some time before the Vessel could be docked and discharge of cargo started. At approximately 1:45 P. M. discharge of both diesel oil and gasoline commenced simultaneously, each of the products being pumped through a separate hose to a pipe connection called a "header" or "riser" on appellee's dock, and from there through a separate pipe into appellee's shore tanks. Appellee had sole control of the handling and distribution of the cargo on shore as soon as it left the ship's side.

Bottle samples were taken by appellee from the vessel's tanks before pumping commenced, and showed clear. Pumping was then commenced and appellee took samples immediately of both diesel and gasoline at the risers on its dock, and the samples were in order and clear. Appellee continued to take samples about every hour until approximately 4:15 or 4:30 P. M., when a sample taken showed that the gasoline was badly off color, whereupon the vessel was notified and pumping stopped immediately. This was the first indication of contamination. Investigation was made on the Egg Harbor by representatives of appellant and then discharge of both products was resumed about two hours later. This continued for about 15 minutes and then discharge of both products was again stopped. At approximately 9:30 P. M. on April 23, discharge of diesel alone was made, and this continued for 20½ hours until approximately 6:00 P. M. on April 24. Gasoline was then discharged alone, and was completed at approximately 5:00 A. M. on April 25, 1943.



The diesel was first run into shore tank 8 by appellee and then diverted into tank 41, about 6:00 A. M. on April 24. The gasoline was first put into shore tank 62 by appellee, and then when the gasoline showed clear coming over the ship's side, the clear gasoline was diverted by appellee to shore tank 61. No claim is made by appellee concerning the products pumped into shore tanks 41 (diesel) and 61 (gasoline), since the products ran into these tanks were uncontaminated.

When discharge of both products was originally commenced at 1:45 P. M. on April 23, there were 2,376 barrels of merchantable diesel oil in shore tank 8, and 11,339 barrels of merchantable gasoline in shore tank 62. 23,131 barrels of allegedly contaminated diesel were run into shore tank 8 with the 2,376 barrels of merchantable diesel already there. 8,140 barrels of contaminated gasoline were run by appellee into its shore tank 62 containing 11,339 barrels of merchantable gasoline. Thus the entire contents of the respective tanks became contaminated.

The District Court concluded that the Carriage of Goods by Sea Act (46 U. S. C. A. 1300-1315) applied to the shipment involved under Paragraph 25 of the charter, and awarded damages for the entire contents of shore tanks 8 (diesel) and 62 (gasoline). The Court's opinion appears at pages 27-41 of the record and also in 59 F. Supp. 100.

The Tanker Voyage Charter Party Form 104 and its provisions are an important part of this case, and likewise the two bills of lading issued in connection therewith.



Unfortunately, they are not very legible as they appear at pages 17, 18, 19 and 20 of the record, and in order to facilitate the work of the Court, appellant is taking the liberty of printing them in full as an Appendix attached hereto. Appellant is also forwarding to the Court four photostatic copies of each, so that the Court will have the physical appearance of the Voyage Charter Party and the bills of lading before it. However, these photostatic copies were in turn made from a photostatic copy and are not too legible, and consequently, appellant believes it will save the time of the Court to have the Appendix attached.

## II.

### STATEMENT OF THE CASE.

Succinctly stated, the questions involved in this appeal are as follows:

(1) Does the Carriage of Goods by Sea Act apply to eliminate the defenses raised, particularly Paragraph 19 of the Voyage Charter, excusing the Vessel "for any consequences arising out of shipping more than one grade of cargo"?

(2) Is appellee entitled to recover for damages to the diesel oil and gasoline in shore tanks 8 and 62 before discharge commenced, if liability be established?

(3) Is appellee entitled to attorneys' fees as damages, and if so, is the sum of \$8,000.00 awarded reasonable, if liability be established?

The first question is raised because appellant has contended throughout that the Carriage of Goods by Sea Act does not apply to the shipment involved. It has been appellant's position throughout that a private contract of carriage is involved, so that the parties can contract in any manner they wish; that the Charter Party is the contract; that the Carriage of Goods by Sea Act does not apply; that any contamination arose as a "consequence arising out of shipping more than one grade of cargo" and consequently there is no liability on appellant.

The second question is raised for the reason that appellee had sole control and handling of the diesel oil and gasoline after it left the ship's side and appellant has contended throughout that if entitled to recover, appellee is not entitled to recover for damages to the merchantable products already in the shore tanks before discharge commenced. The difference involved is \$16,243.56.

The third question is raised because the District Court concluded that appellee was entitled to recover attorney's fees as damages, and awarded the sum of \$8,000.00 as a reasonable attorney's fee. The item of attorneys' fees as damages was injected in the case for the first time during the second day of trial, and appellant contends that attorneys' fees are not proper as an item of damages in a case of this type, but that if proper, the sum of \$8,000.00 was excessive and unreasonable.

### III.

#### ASSIGNMENT OF ERRORS RELIED UPON.

Appellant has assigned 19 errors [pp. 59-62] and relies upon them all except Nos. 2 and 15. These two latter errors refer to the authority and power of the War Shipping Administration to enter into and execute the Voyage Charter of April 14, 1943 on behalf of the appellee, United States of America, and will not be raised or argued by appellee in this appeal.

The assignments of error fall broadly into three categories. Nos. 1 [p. 59] 3, 4, 5, 6 [p. 60], and 14 [p. 61], are concerned with the first question involved, *i. e.*, applicability of the Carriage of Goods by Sea Act.

Nos. 7, 8 [p. 60], 9, 10, 11, 12 and 13 [p. 61], have to do with the second question involved, namely, the correct rule and measure of damages.

Nos. 16, 17, 18, and 19 [p. 62], are concerned with the third question involved, *i. e.*, the right to attorneys' fees as damages, and if so, the reasonableness of the award made.

IV.

ARGUMENT OF THE CASE.

A.

**The Carriage of Goods by Sea Act Does Not Apply.**

Errors 1 (p. 59), 3 and 4 (p. 60) are applicable here and are as follows:

1. The District Court erred in rendering a decree for libelant in any particular, in any sum, or at all.

3. The District Court erred in holding that the Carriage of Goods by Sea Act was by the charter and bills of lading made applicable to the carriage of diesel furnace oil and gasoline in question.

4. The District Court erred in holding that Paragraph 25 of the charter prevailed over other paragraphs and terms of the charter, modifying Paragraph 25 or conflicting therewith.

Before discussing the points of law involved it is important to have in mind the pertinent provisions of the contract of carriage.

The Egg Harbor was chartered by appellee for a single voyage under Form 104 of appellant acting by and through War Shipping Administration. Form 104 is designated as "Tanker Voyage Charter Party" and in this connection was dated April 14, 1943. It appears at pages 17 and 18 of the record in rather illegible form and is printed in full in the appendix.

When the diesel oil was loaded at San Pedro, Captain Olsen signed the bill of lading dated April 17, 1943 [p.



19] which had been prepared by the Standard Oil people [p. 241]. The bill of lading dated April 18, 1943 for the gasoline [p. 20] was signed by Captain Olsen, it having been likewise prepared by the Standard Oil people [p. 242].

The charter party and bills of lading are the documents which were executed and issued in connection with the cargo involved [p. 14].

Paragraph 25 of the charter party is heavily relied upon by appellee as making the Carriage of Goods by Sea Act applicable to the shipment. It reads verbatim as follows:

“25. **CLAUSE PARAMOUNT.**—All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.”

Each of the bills of lading signed by Captain Olsen contains this clause rubber-stamped on the face:

“This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities

under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

Paragraph 24 of the charter also comes into play under appellant's view of the case and reads as follows:

"24. BILL OF LADING.—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter. The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders."

**(1) The Carriage of Goods by Sea Act Did Not Apply Unless by Agreements of the Parties.**

Section 1312 of the Carriage of Goods by Sea Act (46 U. S. C. A. 1300-1315) provides in part as follows:

"This chapter and Section 25 of Title 49 shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . . Nothing in this chapter and Section 25 of Title 49 shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions and any other port of the United States or its possessions;".

It is clear, therefore, that in the absence of anything further the act would not apply to the case at bar.

However, the same Section 1312 contains a proviso as follows:

“Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and Section 25 of Title 49, shall be subject hereto as fully as if subject hereto by the express provisions of this chapter and Section 25 of Title 49:”.

It follows that in situations covered by the proviso the parties may incorporate the act in the contract by an express statement to that effect.

Since the voyage in question was between ports of the United States, the case is one where without anything more, the act would not apply.

**(2) The Charter Party Was a Contract for Private Carriage and the Parties Were Free to Contract as They Chose.**

It is the settled rule in the United States that a vessel operating under a charter party for the full capacity of the vessel as in this case is a *private* carrier and consequently the Harter Act (46 U. S. C. A. 190-195) does not apply, the parties being free to contract as they choose, the same as in any other private contract or charter. In such instance bills of lading issued are in the nature of receipts only, the charter determining the rights of the respective parties.

The leading and most frequently cited authority is *The G. R. Crowe*, 294 Fed. 506 (2 C. C. A. 1924). Suit was brought to recover for loss of gas oil shipped in bulk, the vessel operating under a voyage charter party for its full



capacity as here. There was a considerable shortage of oil upon delivery by reason of leakage and the Court in its opinion assumed that the vessel was unseaworthy, the large leakage being due to defective oil tanks. *In the charter party* was a provision among others providing that "The steamer is not to be accountable for leakage" and the vessel's owner relied on this clause. Bills of lading were also signed by the master and contained the provision that "this shipment is subject to all terms and provisions of . . . the act of Congress . . . approved on the 13th day of February, 1893."

The shipper relied on the clause in the bill of lading which obviously was at variance with the terms of the charter party.

The Court observed that "The Harter Act was not incorporated in the charter party" [p. 508] and then went on to say later on the same page:

"The suit at bar, however, was not brought upon the bill of lading; but a suit thus brought would not have helped libellant, because, where a bill of lading is issued by the master to a charterer, who has contracted for the full capacity of the ship, such bill of lading is merely a receipt, and not a contract, and, in any event, in such circumstances, the master would not have authority to change or modify the charter by a bill of lading. The Fri, 154 Fed. 333, 83 C. C. A. 205.

"In sections 1 and 2, *supra*, it will be noted that the reference is solely to 'any bill of lading or shipping document' and a charter is neither. These sections manifestly refer to common carriers, and were enacted to prevent owners of vessels from imposing self-exculpatory terms which were unjust to shippers." (Emphasis ours.)



In *The Fri*, 154 Fed. 333 (2 C. C. A. 1907) a libel was filed to recover the value of some cattle shipped from Columbia to Cuba, the cattle being lost by reason of stranding. The cattle were shipped pursuant to a charter party which had been customarily signed by the parties and which contained a stipulation exempting the vessel and her owners from liability for errors of navigation "occasioned by negligence, default, or error of judgment of the pilot, master or mariner." The master also delivered a bill of lading to libelants and it provided among other things that the shipment should be "subject to all the terms and provisions of, and all the exemptions from, liability contained in the act of Congress of the United States approved on the 13th day of February, 1893 . . . meaning the act known as the Harter Act." The Court held that the stipulation in the charter party was valid and had the following to say at page 338:

"In this case, however, a common carrier was not a party to the contract. When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire. Hutchinson, Carriers (2d Ed.) 73. See, also, *Sumner v. Caswell* (D. C.), 20 Fed. 249, and the authorities there referred to. It has not yet been decided by any court that a condition in such a contract, to which the Harter act has no application, relieving a shipowner from liability on account of the carelessness of its employes, is contrary to public policy.

"The decisions which deny the validity of such stipulations proceed upon the ground that the carrier is exercising a public employment, and cannot by such stipulations relax his obligations to the public. Private carriers are not subject to the exceptional or

extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable.”

The court is doubtless aware of the fact that the Harter Act was supplanted and supplemented by the Carriage of Goods by Sea Act in 1936. The Courts have frequently turned to decisions under the Harter Act in construing the Carriage of Goods by Sea Act. Thus in *Spencer Kellogg & Sons v. Great Lakes Transit Corporation*, 32 F. Supp. 520 (D. C. Mich. 1940), the Court said at page 530:

“I hold that the Congress intended these words (i. e., ‘in the navigation or in the management of the ship’) as used in the Carriage of Goods by Sea Act, 1936, to have the same meaning as they assigned to them in the long line of decisions construing these words as used in the Harter Act.”

A fairly recent case citing *The G. R. Crowe* and *The Fri* with approval as well as several other cases is *The Westmoreland*, 86 F. (2d) 96 (2 C. C. A. 1936), which involved a voyage charter to transport a cargo of sulphate of ammonia. The Court said at page 97:

“The Charter, being for the whole barge, made her a private carrier and left the parties free to contract as they chose. *The Fri*, 154 F. 333 (C. C. A. 2); *The G. R. Crowe*, 294 Fed. 506 (C. C. A. 2); *The Elizabeth Edwards*, 27 F. (2d) 747 (C. C. A. 2); *The Nat Sutton*, 62 F. (2d) 787, 789 (C. C. A. 2).”

Knauth in his text, *The American Law of Ocean Bills of Lading*, 1941 Revised Edition, states the rule thus at page 131:

"In interpreting the Harter Act, the American courts developed a line of cases, of which *The G. R. Crowe* is the most commonly cited example (1924 A. M. C. 5, 294 Fed. 506, 6 Dor. 344 (2 C. C. A. 3) certiorari denied, 264 U. S. 586) that carriage of an entire shipload for a single shipper is 'private' carriage and not common carriage, and hence not covered by the Harter act."

**(3) The "Bills of Lading" Signed by the Master Were Receipts Only and No Part of the Contract of Carriage.**

Perhaps the best discussion of this rule and one of the leading authorities for it is *The Fri*, 154 Fed. 333 (2 C. C. A. 1907), where the Court said at page 337:

"The rule is that where there is a charter party *the bill of lading operates as the receipt for the goods* and as a document of title passing the property of the goods, *but not as varying the contract* between the charterer and the shipowner. *Wagstaf v. Anderson*, 5 C. P. Div. 171, 177; *Rodocanachi Sons & Co. v. Milburn Bros.*, 6 Asp. 100, 103; *Sewell v. Burdick*, 10 App. Cas.: 74, 105; *The Chadwick* (D. C.), 29 Fed. 521." (Emphasis ours.)

The rule was reiterated in *The G. R. Crowe*, 294 Fed. 506 (2 C. C. A. 1923), where the Court said at page 508:

"The suit at bar, however, was not brought upon the bill of lading; but a suit thus brought would not have helped libellant, because, where a bill of lading is issued by the master to a charterer, who has contracted for the full capacity of the ship, such bill of lading is merely a receipt, and not a contract, and, in



any event, in such circumstances, the master would not have authority to change or modify the charter by a bill of lading. The Fri, 154 Fed. 333, 83 C. C. A. 205."

In other words, the situation presented in a voyage charter party as here is that the master of the vessel gives to the shipper a document usually called a "bill of lading" but which is in reality simply a receipt for the goods. It is something to show that the shipper has so much goods—in this case diesel oil and gasoline—on board. It is in no sense the contract of carriage between the original parties, *i. e.*, ship and shipper. *The contract is the charter party.*

**(4) The Carriage of Goods by Sea Act Was Never Incorporated in the Charter Party and Consequently Does Not Apply to the Shipment in Question.**

This may seem a brash statement on first encounter but a careful reading of the pertinent provisions of the *charter party*—which is *the only contract of carriage between the original parties*—bears out the contention one hundred per cent. It should be noted that this case *involves only the original parties* in the deal, the United States and Standard Oil, ship and shipper if you please. There are no third parties involved whatever and no rights of third parties or intervenors to be considered.

*Paragraph 25 only talks about bills of lading.* It says nothing whatever about the Carriage of Goods by Sea Act being incorporated *in the charter party*. Let us examine it basically, the emphasis being ours:

"25. **CLAUSE PARAMOUNT.**—*All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the*



United States, approved April 16, 1936, which shall be deemed to be incorporated *therein*, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.”

Where is any language or discussion *making the charter party* subject to the provisions of the Act? There isn't any. It is plain that the Act is in no way incorporated into or made a part of the *charter party itself*.

Paragraph 24 must be read in conjunction with Paragraph 25 and we quote Paragraph 24 again, the emphasis being ours:

“24. BILLS OF LADING.—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Maker or Agent of the Owner *shall be without prejudice to the terms, conditions and exceptions of this Charter*. The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders.”

It is obvious that the “bills of lading” referred to in Paragraph 24 of the charter party were simply receipt forms “for cargo shipped” in the form appearing at the

end of the charter party. In this connection it is to be remembered that Captain Olsen testified that the bills of lading *were prepared* by Standard Oil and he signed them after the cargo had been loaded (pages 241-242).

Where there are opposite provisions in a voyage charter party and a "bill of lading" as in the case at bar, the contract of carriage being a private one as here, *the charter party prevails*. That is founded on the basic proposition that the *charter party is the contract of carriage* and the bill of lading is a mere receipt. The *G. R. Crowe, supra*, is excellent authority on the point—the Harter Act was not incorporated in the charter party but the bill of lading did incorporate it and the Court held that the Harter Act was no part of the contract. The same situation prevailed in *The Fri, supra*. There are a number of other cases along a slightly different line which support appellant's position, although a casual reading might give the impression that they hold otherwise. We refer to such cases as *The Framlington Court*, 69 F. (2d) 300 (5 C. C. A. 1934) which involved a voyage charter for the carriage of news print paper. The charter was for full capacity and hence amounted to a private contract of carriage. *The charter itself* contained this language:

"It is mutually agreed that this contract is subject to all the terms and provisions of . . . an act relating to navigation of vessels, etc."

In other words, the very charter party itself expressly incorporated the Harter Act which is far different from the situation here where Form 104 mentions and refers to bills of lading only in Paragraph 25.

To the same effect are *The Agwimoon*, 24 F. (2d) 864 (D. C. Maryland 1928); *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F. (2d) 194 (D. C. New York 1927), affirmed without opinion in 32 F. (2d) 1020; and *The Ferncliff*, 22 F. Supp. 728 (D. C. Maryland 1938) affirmed without opinion in 105 F. (2d) 1021. In all these cases the Harter Act was expressly incorporated into the charter itself. In the case at bar there is nothing of the kind.

Why then, it may be asked, is Paragraph 25 in the charter at all? This is a fair question. If the terms of the bill of lading in a case of this type conflict with the charter party, the charter party controls as we have seen in cases like the *G. R. Crowe*, *supra*. However, in the case at bar we believe that Paragraph 25 was inserted *for the protection of third persons*. If Standard Oil transferred the bills of lading for value to third persons who were strangers to the charter party, then the bills of lading would take on a new significance as to third persons. They would no longer be simply receipts—as between the original parties—but rather an undertaking on the part of the vessel and its owner with the holders. The following language from *The Fri*, 154 Fed. 333 (2 C. C. A. 1907) at pages 336-337, is right in point:

“The usual practice is for the master, or agent of the shipowner, to give bills of lading for the cargo although it may be shipped under a charter party. When the charterer himself ships the goods these bills of lading operate as receipts for them, and also as documents of title which he can negotiate, and thereby constructively transfer possession of the goods. But they do not, as between the shipowner and the charterer, operate as new contracts, or as modifying the contract in the charter party. *Where the bill*



*of lading has been transferred for value to third persons who are strangers to the charter party, its terms become very important. It then constitutes an undertaking on the part of the shipowner with the holders, which is independent of the charter party, except so far as that is expressly incorporated in it. Carver, Carriage by Sea, 151, 152. It constitutes the contract between the parties where there is no charter party, but where there is a charter party it never supersedes any unequivocal provisions therein. This has long been settled by the adjudications."* (Emphasis ours.)

There is nothing strained or tricky in the terms of the charter party as urged by appellant. It is clear that the Carriage of Goods by Sea Act is not incorporated therein and *is not applicable to any shipment as between the original parties.* Paragraph 25 and the rubber stamped provision on the "bills of lading" come into play only for the benefit of third persons.

## B.

### There Is No Liability for Any Contamination Under the Charter Party.

Errors 5 and 6 (page 60), are involved and read as follows:

5. The District Court erred in holding that respondent's first affirmative defense, based upon Paragraph 19 of the charter, was not applicable and did not constitute a defense to the libel.

6. The District Court erred in holding that respondent's second affirmative defense, based upon Paragraphs 7 and 20(a) of the charter, was not applicable and did not constitute a defense to the libel.

*See also, Globe Ins. Co. 263 U.S. 48*



Paragraph 19 of the charter party reads as follows:

“19. Cleaning—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, *nor for any consequences arising out of shipping more than one grade of cargo.*” (Emphasis ours.)

This was set up as a special defense by appellant in its answer (pp. 9 and 10), and urged by appellant at the time of trial.

The trial Court recognized that this would be a full defense if the Carriage of Goods by Sea Act did not applying, Judge Harrison stating in the opinion, as follows (pp. 28-29):

“The first question to be determined is whether the Carriage of Goods by Sea Act covers the shipment of oil involved. The libelant contends that it does, while the respondent holds to the contrary, because the vessel was operating under a charter for the full

capacity of the vessel and therefore respondent was free to contract as a private party. Under this reasoning the parties were in the relationship of a bailor and bailee. Respondent then refers to paragraph 19 of the charter party which provides:

'Except as may otherwise be indicated in Part I, the vessel shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo.'

"It naturally follows that if the Carriage of Goods by Sea Act does not apply, the libel must be dismissed because of the above provision."

Appellant respectfully contends that any contamination in the discharge of the cargo from the Egg Harbor was a "consequence arising out of shipping more than one grade of cargo" and consequently, there is no liability on the part of appellant under the plain terms of the contract of carriage. We have found no precise cases on the subject although a similar provision was contained in the charter party in *The G. R. Crowe*, *supra*. In that case, Article 16 of the charter party read as follows:

"The Captain is bound to clean the tanks, pipes, and pumps of the steamer to the satisfaction of the Charterer's inspector. *The steamer is not to be responsible for any consequences arising through Charterer's shipping different kinds of oil.* The steamer is not to be accountable for leakage." (Appearing at page 507 of 294 Federal—Emphasis ours.)

It will be recalled that in *The G. R. Crowe*, leakage was involved and the provision, "The steamer is not to be accountable for leakage" excused the vessel and its owner.

If contamination had occurred, it is reasonable to assume that the Court would have excused the vessel and its owner by reason of the provision, "The steamer is not to be responsible for any consequences arising through Charter's shipping different kinds of oil."

The terms of Paragraph 19 are reasonable in the light of all the circumstances. The United States was engulfed in "do or die" World War II. Oil and gasoline were the things that made airplanes, tanks, ships and all the mechanisms of war run. Oil and gasoline were a prime double-plus necessity. Old tankers and new tankers were working with tremendous dispatch, often with green crews. It is well known that 140,000-barrel tankers were, in the language of the trade, "making a full turn-around" in thirty-six hours, whereas the normal time runs usually six or seven days. The emphasis was on speed and getting things done.

In the case at bar, the Government was transporting petroleum products during war-time under a private contract of carriage for Standard Oil, and it was an entirely reasonable and proper thing, under all the attendant circumstances, for the charter party to contain the provision exempting the vessel from "any consequences arising out of shipping more than one grade of cargo." It is interesting, likewise, to note that *The G. R. Crowe*, *supra*, arose during World War I, and a similar provision was in the charter party in that case as above noted. In peace time the rigors of competition would probably serve to automatically eliminate such provision in a contract of carriage.



C.

**Damages Should Not Include Diesel Oil and Gasoline  
Already in Shore Tanks 8 and 62, if Appellee Is  
Entitled to Recover.**

**(1) Appellant Should Not Be Chargeable With Appellee's  
Activities on Shore.**

Errors 7, 8 (p. 60), 9, 10, 12 and 13 (p. 61), are applicable here as follows:

7. The District Court erred in applying the incorrect rule and measure of damages.

8. The District Court erred in holding that libelant was entitled to the full amount of damages pertaining to the diesel furnace oil and gasoline in the sum of \$49,158.12.

9. The District Court erred in not holding that, if entitled to damages, libelant was not entitled to damages on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when contaminated products from the vessel were added thereto, such damages being in the sum of \$16,243.56.

10. The District Court erred in finding that respondent at the time the charter was made should reasonably have understood or contemplated that the cargo would be received by libelant from the "Egg Harbor" into storage tanks already partly full.

12. The District Court erred in not finding that no diesel furnace oil was contaminated by respondent.

13. The District Court erred in finding that the contents of libelant's shore tanks in question were uncontaminated before discharge from the S. S. "Egg Harbor" commenced.



The testimony of Mr. Fred R. Kilbourn [pp. 70-143], Plant Superintendent of appellee's Point Wells plant, tells the story of appellee's activities and what transpired on shore. A brief review of his testimony is necessary as a background for this phase of appellant's argument.

The headers on the dock were equipped to take samples as the fluid passed through the headers from the vessel into the shore pipes [p. 74]. Discharge of *gasoline* from the Egg Harbor commenced about 1:45 P. M. on April 23, 1943, and discharge of *diesel* commenced about three-quarters of an hour, or an hour later [p. 78]. At the time discharge commenced, there were 2,376 barrels of diesel oil in shore tank 8, and 11,339 barrels of gasoline in shore tank 62 [p. 79]. Diesel oil went into shore tank 8, and gasoline into shore tank 62. Samples were taken by Standard Oil employees from the headers when discharge commenced, and the gauger took these samples hourly [p. 80]. The first sign of anything unusual was around 4:15 or 4:30 P. M., when the gauger reported that the gasoline was badly off color [p. 80]. Pumping was stopped immediately, the vessel notified, and the vessel's representatives, Messrs. Hicks and Stevens, came from Seattle and checked on board the vessel [p. 81]. Pumping was resumed of both products simultaneously about two hours later [p. 83], but then stopped in about 15 minutes, because the gasoline was still off color [p. 84]. Pumping of diesel oil alone was then commenced, about 9:30 P. M., and continued into shore tank 8 until 6 A. M., on April 24, when it was diverted by appellee into shore tank 41. Pumping continued into shore tank 41 until approximately 6 P. M., when discharge of the diesel was completed [pp. 84 and 85].

Pumping of gasoline alone was then commenced, about 8 P. M. on April 24, and finished some 9 hours later, approximately 5 A. M. on April 25 [p. 98].

The diesel appeared to be in good order, as far as Mr. Kilbourn and others could tell [p. 85]. Samples were taken of the vessel's tanks on board the Egg Harbor, by appellee, during the evening of April 23, about 9:30. Samples were also taken of shore tanks 8 (8 A. M. on April 24) and 62 [evening of April 23], and these samples were sent to Laucks Laboratories at once for analysis [pp. 86 and 87]. The samples from the vessel's tanks 5, 6 and 7, containing diesel, showed *merchantable* [p. 96]. The composite sample from the vessel's tanks, 2, 3 and 4, containing gasoline, showed *merchantable* [p. 96]. The sample from shore tank 8, containing diesel—taken around 8 A. M. on April 24, showed *unmerchantable* [pp. 97 and 131]. The sample from shore tank 62, containing gasoline, showed *unmerchantable* [p. 97].

It is to be noticed that the procedure on the discharge of gasoline was different from the diesel, in that when pumping of the gasoline alone was commenced, it was run out of each vessel's tank until it showed clear in each tank, all going into shore tank 62 [pp. 98 and 99]. Then when the gasoline was running clear, shift was made to shore tank 61 and discharge completed into shore tank 61. There was no difficulty there, all the contents being *merchantable*.

Contrast the gasoline procedure with the diesel oil—pumping of diesel alone started at 9:30 P. M. on April 23, into shore tank 8, and continued until 6 A. M. on April 24, when for some reason best known to appellee, diversion was made into shore tank 41 and continued un-

til discharge of the diesel was completed. The samples from the diesel tanks on the ship—numbers 5, 6 and 7, taken at 9:30 P. M. on April 23, showed *merchantable*, and yet the diesel was continued to be pumped into shore tank 8 for approximately 10½ hours before diverting to shore tank 41. The Laucks test showed that shore tank 8 was *unmerchantable*; apparently no samples were taken from shore tank 8 during the evening of April 23. Samples from shore tanks 41 (diesel) and 61 (gasoline) showed *merchantable*, for which appellee makes no claim.

On cross-examination, Mr. Kilbourn readily admitted that Standard Oil had sole control from the minute the diesel and gasoline went over the ship's side, and at no time informed the vessel where the products were being put. The following appears at page 108:

“Q. By Mr. Mack: Putting it another way, Mr. Kilbourn, from the minute the gasoline and the diesel went into the discharging hose, the ship, from that time on, had nothing whatever to do with where those products went, did it? [36] A. No, that is right.

Q. Now, at any time during the discharging operation, did you tell the ship or any of its crew or operators where you were putting these respective products? A. No.

Q. In other words, to use a familiar phrase of the street, it was strictly your own business where you put them. Isn't that right? A. Yes.”

There were 2,376 barrels of diesel in shore tank 8 before discharge commenced [p. 115] and 11,339 barrels of gasoline in shore tank 62 [p. 112]. The diesel ap-



peared to be fine [p. 116]. The gasoline was all right until 3 or 3:30 P. M., Mr. Kilbourn's testimony on the point on page 117 being as follows:

"Q. So, up to that point at 3:00 o'clock or 3:30, your test showed the gasoline coming off the boat was all right? A. Yes. [47]"

Mr. Kilbourn received the Laucks reports on the samples submitted between 11 o'clock and 1:00 o'clock in the afternoon of April 24. Diesel was going into shore tank 41 and Mr. Kilbourn testified as follows at page 121:

"Q. Now, when you received that report from Loucks Laboratories, did you do anything about the diesel, so far as pouring it into any other tanks is concerned? A. No. We were pumping tank 41 at that time and we just kept on pumping. We didn't change over at all.

The Court: You mean after you found out that the diesel in the tanks was contaminated, you continued to pump diesel?

The Witness: In tank 8, we finished pumping, and pumped tank 41 which was practically only a couple of hours pumping on 41 at the time.

The Court: And you continued to pump into this same tank?

The Witness: Yes. [52]"

It was further testified by Mr. Kilbourn at page 132 that diesel oil can be contaminated by a very small quantity of gasoline, whereas, on the other hand, gasoline can stand a certain amount of diesel oil. We quote his testimony on the point, for the reason that it seems impor-



tant—it would seem that more care should be exercised for a possible contamination of diesel than for gasoline. The testimony on page 132 is as follows:

“Q. Now, with respect to diesel oil, if there is gasoline in it, let us say, or it is contaminated with gasoline in any way, is there any change in the odor from it? A. Diesel oil can be contaminated by a very small quantity of gasoline and the odor would not be detected at all. You have to have a pretty sensitive nose to smell gasoline in diesel.

Q. Ordinarily doesn't diesel oil of the kind handled here have a rather flat odor? A. Diesel oil varies considerably in odor depending on the wash they put it through in the refinery. Some diesel comes through with practically no odor, and others have a very strong petroleum smell. I can't describe it, but it is very noticeable. In that case the diesel oil was very strong.

The Court: Well, I assume that a certain amount of contamination of the diesel oil with gasoline, if it was not too heavy, wouldn't hurt it any, would it?

The Witness: No. Gasoline could stand a certain amount of diesel oil.

The Court: And diesel oil could stand some gasoline?

The Witness: No, very little. You can take a tank that [66] has contained gasoline and pump it out dry and leave fumes in the tank and full it up two-thirds or full, and there is enough gasoline vapors in there to lower the flash point four or five degrees without having any product in the tank at all. Of course, that isn't harmful because it allows a variance of 20 degrees there.”

It seems clear from the facts that a lot of *good diesel* from the vessel was pumped into shore tanks 8, the tests for which, taken on the morning of April 24 after pumping into shore tank 8 had been stopped at 6 A. M., showed *unmerchtable*. We say "good diesel from the vessel" because samples taken by appellee from the ship's diesel tanks 5, 6 and 7 about 9:30 on the evening of April 23 showed *merchtable*. The conclusion is apparent that from 9:30 P. M. until 6 A. M.—about 10½ hours—*good diesel* was going over the ship's side into tank 8, which later showed as *unmerchtable*. We think the conclusion further apparent that the contents of shore tank 8 must have been contaminated before 9:30 P. M. on April 23; and that, diesel oil being easily contaminated according to Mr. Kilbourn's testimony, the good diesel which went over the ship's side for 10½ hours after 9:30 P. M. on April 23 became contaminated in appellee's shore tank 8.

Now with regard to the gasoline, a different procedure was followed because the color test was reliable. When the gasoline pumped from the ship's tanks showed clear, it was then diverted into shore tank 61, and that was all good gasoline. On the other hand, 8,140 barrels of contaminated gasoline from the ship were run in with 11,339 barrels of gasoline already in shore tank 62, making a contaminated mass of gasoline of 19,479 barrels [p. 248].

Under the foreseeable rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 English Reprint 145 (1854), appellant contends that it is improper to charge appellant with what appellee's agents did, or would do with the products in their exclusive possession and control. Appellant had no idea what Standard Oil would do with the diesel and gasoline, and was never at any time told what Standard

Oil was doing with the products once they went over the ship's side. It is also to be remembered that Paragraph 7 of the Voyage Charter Party provided in part as follows:

“7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, *and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.*” (Emphasis ours.)

It is undisputed that Standard Oil could do anything it wished with the diesel and gasoline once it went over the ship's side, and that appellant had no notice or knowledge that appellee would run the products into shore tanks already partly full.

Appellee will doubtless claim, as it did at the trial, that it is entitled to recover for the contents already in shore tanks 8 and 62 as special damages within the contemplation of the parties. 13 C. J. S. 619 dealing with Carriers states the rule as to special damages thus:

“In an action for loss of, or injury to, goods shipped, only such damages are recoverable as were contemplated, or might reasonably have been contemplated, by the parties. To authorize a recovery of such damages as would not ordinarily flow from the loss or injury, it is essential that at the time of shipment the peculiar circumstances from which special damages would arise because of such loss or injury should be made known to the carrier; and this rule applies when it is sought to recover for loss of profits arising from the loss of the goods in transit.”



Appellant never had any knowledge or notice specifically of where appellee was going to put the diesel and gasoline. Appellant could conjecture that the products would go into empty shore tanks, or into partly filled shore tanks, but it at no time knew just what was being done or where the diesel and gasoline were being placed.

In *Florida East Coast Railway Co. v. Peters*, 83 South. 559 (Fla., 1919), a shipper filed suit against the railroad company for damages because of the failure of the company to transport and deliver, within a reasonable time, large quantities of crate material designed to be used in crating tomatoes to be shipped to market. The shipper claimed loss of a part of his crop, and other damages such as keeping workmen on the payroll. The Court stated, at page 564:

“(6-8) Assuming that the allegations as to the notice to the defendant of the special damages likely to result from the delay in transporting the crates are sufficient, the evidence does not show that the defendant had actual notice as to the special damages claimed from alleged injury to the growing tomato vines because the ripe tomatoes were not promptly picked therefrom, *and notice from common knowledge thereof cannot legally be imputed to the defendant carrier* even if such special damages are capable of reasonable accurate ascertainment. Such special damages appear to be remote or conjectural and not an ordinary result of the alleged negligence that should have been contemplated.” (Emphasis ours.)

The dire consequences of charging appellant for damages to contents already in the shore tanks, if liability be



established, are readily apparent from the nature of the goods. It is entirely conceivable that 10,000 barrels of contaminated gasoline could be run in ten lots of 1,000 barrels each, into ten different shore tanks. If each of the shore tanks already had 20,000 barrels of merchantable gasoline in each of them, you would then have the situation of 10,000 barrels contaminating *200,000 barrels*. As it is, in the principal case appellee ran 8,140 barrels of contaminated gasoline into 11,339 barrels of merchantable gasoline, and makes claim for the entire 19,479 barrels. The situation could be much worse with diesel, which, according to Mr. Kilbourn, is much more easily contaminated than gasoline.

Perhaps it is a question of emphasis. It seems more reasonable that appellee should take the loss on the contents already in the shore tanks rather than appellant, when appellant had no knowledge of what was going on shore-side and appellee only was in the saddle "on the beach."

**(2) Appellee Failed to Minimize Damages When Contamination of the Gasoline Was First Discovered.**

Error 11 (p. 61) is as follows:

11. The District Court erred in not finding that libelant failed to mitigate damages by refusing all further discharge of [70] both diesel furnace oil and gasoline until appropriate laboratory tests had been made and the results known when contamination of the gasoline was first discovered by libelant about 4:30 P. M. on April 23, 1943.

It is submitted that appellee did not discharge its duty to minimize damages after the contamination of the gasoline was definitely first discovered, about 4:30 P. M. on April 23. Appellee was on notice that something was wrong. That was the time for appellee to refuse all further discharge of *at least the diesel* until appropriate laboratory tests had been made and the results known. We say "at least the diesel" for the reason that visual examination of the gasoline was satisfactory, but apparently anything but laboratory testing of the diesel was not.

Such tests as were made by appellee itself of the diesel, as distinguished from laboratory tests, at no time displayed anything wrong with the diesel, both during the period before 4:30 P. M. on April 23 and afterward during the discharge of the diesel alone, commencing about 9:30 P. M. on April 23. *In fact, appellee's own testimony shows that laboratory tests of samples of the diesel taken by Standard Oil from the vessel's tanks 5, 6 and 6 during the evening of April 23 showed that such diesel was all good.* The inference seems patent that *good diesel* was discharged from the Egg Harbor beginning at 9:30 P. M. and is strengthened by the fact that Standard Oil diverted from shore tank 8 to shore tank 41 about 6 A. M. on April 24—and shore tank 41 was all good.

The rule as to minimizing damages is digested at 13 C. J. S. 620, under Carriers, as follows:

"It is the duty of the property owner to make reasonable efforts to minimize the damages, and no recovery can be had for damage which such efforts would have prevented."

In *United States v. Brookridge Farm, Inc.*, 111 F. (2d) 461 (10 C. C. A. 1940), plaintiff recovered a judgment for the breach of a contract to deliver milk to a Government hospital. The Court discussed the rule as to mitigation of damages and said, at page 465:

“The general rule is that one who suffers injury as the result of a tort or a breach of contract, is required to exercise reasonable care and diligence to avoid the loss or to minimize the resulting damage.”

We feel that there is little quarrel with the rule of mitigation of or minimizing damages. Again its application to a given set of facts is where the controversy creeps in. It is appellant's view that it was up to appellee to reasonably minimize the damages, at least on the diesel, in the manner indicated and that, accordingly, appellee is not entitled to damages, if liability be established, for the diesel put into shore tank 8 from 9:30 P. M. on April 23 until 6 A. M. on April 24.

The damages on account of the diesel and gasoline already in the shore tanks amount to \$16,243.56 (page 48). The damages by reason of the diesel pumped from 9:30 P. M. on April 23 until 6 A. M. on April 24 into shore tank 8 are not in evidence, but appellant reasonably believes they can be ascertained.



D.

**Damages Should Not Include Attorneys' Fees, but, If Proper, the \$8,000.00 Awarded Is Excessive.**

Errors 16, 17, 18 and 19 (page 62) are as follows:

16. The District Court erred in holding that libelant was entitled to attorney's fees in any sum or at all as damages.

17. The District Court erred in finding that if libelant were entitled to attorney's fees as damages the sum of \$8,000 was reasonable or reasonably incurred for attorney's fees.

18. The District Court erred in admitting evidence relevant to attorney's fees over the objection of respondent that attorney's fees were not specifically pleaded as a portion of the damages claimed, that the question of attorney's fees as a portion of such damages had not been previously considered in the case and that attorney's fees were not a proper item of damages under the Suits in Admiralty Act.

19. The District Court erred in holding that attorney's fees [71] were recoverable or proper as damages under the Suits in Admiralty Act.

The very first time that the subject of attorneys' fees was mentioned to appellant was toward the end of the second day of trial of the case, when Mr. Hall, proctor for appellee, brought up the subject of attorneys' fees as damages under Paragraph 34 of the charter party, reading as follows:

"34. Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder."



At that time Mr. Mack, one of the proctors for appellant, stated (page 292):

“Mr. Mack: I wasn’t aware that a claim of that kind was being made, and of course there is no specific allegation of that in the libel unless it is under the broad prayer there.”

The first discussion of attorneys’ fees is found at pages 291-293. On the last day of trial, February 2, 1945, Mr. Hall brought up the subject again and introduced an itemized statement of the services performed by his firm in the case. Pages 334-339 deal with what transpired, and Mr. Mack objected to any evidence relative to attorneys’ fees (p. 334). Mr. Hall stated that his testimony would be that \$9,000.00 would be a reasonable fee and it was stipulated that if called he would so testify (page 339).

No mention was made of attorneys’ fees in the original libel (pp. 3-6) although admittedly Paragraph 2 of the prayer of the libel (p. 6) was in very broad form. Amendment to the libel specifically referring to attorneys’ fees, being designated as a new Paragraph 12, was permitted by the Court to conform to proof, and a new Paragraph 4 of the prayer was similarly permitted, specifically referring to attorneys’ fees—this appeared at page 42.

It will be remembered that the authority for appellee to bring this suit rests in the Suits in Admiralty Act, 46 U. S. C. A. 741-752. Section 743 provides that a decree rendered by the Court in a case under the Act may include costs and it may also include interest at 4% per annum, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

The allowance of costs and interest are within the discretion of the Court as in the usual admiralty case.

Nothing whatever is said about attorneys' fees in Section 743 or elsewhere in the Act. We have been unable to find any authority on the subject and can only argue that since the Act enables private parties to do something that they could not do before its enactment, *i. e.*, sue the United States in the manner provided, that the Act should be strictly construed; that when it makes no specific reference to attorneys' fees, while making provision for costs and interest at 4% per annum "or at any higher rate which shall be stipulated in any contract upon which such decree shall be based," it inferentially excludes attorneys' fees as being recoverable in suits under the Act.

Turning to the question of reasonableness of the award made, if attorneys' fees as damages are proper in the case and if appellee is entitled to recover, it is well settled that the Court is in the nature of an expert himself, having had legal training and experience, and may pass upon the reasonableness of attorneys' fees with or without the aid of testimony of witnesses as to value. In like manner, appellate courts can also pass upon the reasonable value of attorneys' services. In *Elconin v. Yalen*, 208 Cal. 546, 282 Pac. 791 (1929) the Court said, at pages 549-50 of 208 Cal:

"The court had before it detailed evidence as to the nature and extent of the services rendered and was empowered to use his own experience and judgment as to the reasonable value thereof, with or without the aid of testimony of witnesses as to value (citing cases)."

*Kirk v. Culley*, 202 Cal. 501, 261 Pac. 994 (1927) states the rule, thus at page 510 of 202 Cal., relative to the power of appellate courts:

“If the trial court may make an appraisal and adjudication of value of such services, it must be presumed that appellate courts possess like power and ability so to do.”

The memorandum of services performed by appellee's proctors (pp. 336-337) shows a total of 268 $\frac{1}{4}$  hours time spent prior to commencement of the trial, exclusive of the time spent in telephone conversations and in the preparation of correspondence. If the round figure of 300 hours be used, it results in an award of \$26.66 an hour, the trial court having awarded \$8,000.00 as attorneys' fees (pp. 41 and 50).

Appellant respectfully submits that the award is excessive and should be reduced, assuming that attorneys' fees are proper as damages, and that appellee is entitled to recover. It is well known that in many instances where agencies of the United States employ special counsel, it is on the basis of \$10.00 an hour for senior counsel and \$7.50 per hour for junior counsel. If an award for attorneys' fees is proper, we believe the \$8,000.00 should be reduced somewhere around the neighborhood of a basis of \$10.00 an hour to conform to what the Government pays in many instances in employing special counsel. There is the further reason that this case may set a precedent on the point, and serious consideration should be given to the general basis upon which an award for attorneys' fees against the United States should be made.

**Conclusion.**

Appellant respectfully submits that the decree should be reversed for the reasons stated, primarily because the Carriage of Goods by Sea Act does not apply to the private voyage charter involved, and Paragraph 19 affords a full defense to appellant.

Respectfully submitted,

CHARLES H. CARR,

*United States Attorney,*

ROBERT E. WRIGHT,

*Assistant United States Attorney.*

LILLICK, GEARY, MCHOSE & ADAMS,

AUGUSTUS F. MACK, JR.,

*Proctors for Appellant.*







## APPENDIX.

The following are the Charter Party and Bills of Lading which were executed and issued in connection with the carriage of the cargo involved in this suit:

Form No. 104

WARSHIPOILVOY

CONTRACT No. 268-A

6/1/42

Part I

### TANKER VOYAGE CHARTER PARTY

#### PART I

CHARTER PARTY made as of April 14, 1943, at Philadelphia, Pa. between the UNITED STATES OF AMERICA, acting by and through the WAR SHIPPING ADMINISTRATION (hereinafter called the "Owner") of the good American SS "EGG HARBOR" (hereinafter called the "Vessel") and STANDARD OIL COMPANY OF CALIFORNIA (hereinafter called the "Charterer")

This Charter Party consists of this Part I and Part II on the reverse hereof. Unless in this Part I otherwise provided, all of the provisions of Part II shall be part of this Charter Party as though fully incorporated herein.

Net Registered Tonnage of Vessel: 6,126 Classed: AI  
American Bureau of Shipping

Loaded Draft of Vessel Applicable for this Voyage, 30 ft.  
9½ in. in salt water.

Capacity of: 135,000 bbls. (of 42 American measured gallons at 60° F. each)

~~or tons of 2240 lbs~~ of Gasoline or Diesel Oil  
(10% more or less, vessel's option.)

Now:.....

Coiled: in all main tanks

Loading Port: San Pedro and/or El Segundo, California

Cargo: Gasoline and/or Diesel Oil

Discharging Port: safe U. S. Pacific Northwest

Freight Rate: W. S. A. Rate applicable

Payable at: Philadelphia, Pa.

Readiness Date: April 12, 1943

Cancelling Date: May 12, 1943

Hours for Loading & Discharging: 96

Demurrage per hour: \$135.00

Last 2 cargoes:.....

SPECIAL PROVISIONS:

1. This Charter Party cancels and supersedes Charter Party dated April 5, 1943, Contract No. 268.

OK

HHF

IN WITNESS WHEREOF the parties hereto have executed this agreement, in triplicate, as of the day and year first above written.

Witness the signature of:

Walter E. Rex

J. W. Foy

UNITED STATES OF AMERICA

By: WAR SHIPPING ADMINISTRATION

By: KEYSTONE SHIPPING Co., Agent

By: Walter E. Rex

Walter E. Rex, Secretary

H. H. FLYNN

STANDARD OIL COMPANY OF CALIFORNIA

J. L. HANNA

Vice President

Witness the signature of:

J. L. Hanna



[The following clause is rubber-stamped on the face of the document]:

“This document contains information affecting the national defense of the United States within the meaning of Espionage Act, 50 U. S. C., 31 and 32 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.”

Form No. 104

WARSHIPOILVOY

6/1/42

Part II

TANKER VOYAGE CHARTER PARTY

PART II

LOADING PORT

WARRANTY

CARGO

DISCHARGING PORT

FREIGHT RATE

INSPECTOR'S CERTIFICATE

1(a).—The Vessel, classed as aforesaid and to be so maintained during the currency of this Charter, shall, with all convenient dispatch, proceed as ordered to Loading Port or so near thereunto as she may safely get (always afloat), and being tight, staunch and strong, and having all pipes, pumps and heater coils in good working order, and being in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the exercise of due diligence, perils of the sea and any other cause of whatsoever kind beyond the Owner's control excepted, shall load (always afloat) from the factors of the Char-

terer a full and complete cargo of Petroleum and/or its products in bulk, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, stores and furniture (sufficient space to be left in the expansion tanks to provide for the expansion of the cargo), and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, to Discharging Port, or so near thereunto as she may safely get (always afloat), and deliver said cargo. The freight shall be at and after the rate stipulated in Part I hereof, based on intake quantity as shown on the Inspector's Certificate of Inspection, the services of the Petroleum Inspector to be arranged and paid for by the Charterer who shall furnish the Owner's Agent with a copy of the Inspector's Certificate. No deduction of freight shall be made for water and/or sediment contained in the Oil.

1(b). FREIGHT PAYABLE.—Full freight shall be irrevocably earned on cargo as loaded, vessel and/or cargo lost or not lost; payment to be made in United States Dollars to Owner's Agent at the Agent's place of business upon receipt by the Agent of figures indicating quantity of cargo loaded as provided in 1(a) above. On completion of loading, Owner will order vessel to sail to discharging port, Charterer nevertheless remaining liable to the Owner for all freight and charges, vessel and/or cargo lost or not lost.

1(c). ADVANCES.—Cash shall be advanced by Charterer to the Master or Owner's Agents, if required, for ordinary disbursements at ports of loading and/or discharge at current rates of exchange.

2. TIME FOR NAMING LOADING PORT.—The Charterer shall name the loading port twenty-four (24) hours prior

to the Vessel's readiness to sail from the last previous port of discharge, or from her bunkering port for the voyage, or upon signing this Charter if the Vessel has already sailed. Any extra expenses incurred by reason of the Charterer's delay in furnishing loading port orders shall be paid for by the Charterer, and any time thereby lost to the Vessel shall count as used lay time.

3. READINESS AND CANCELLING DATE.—Lay time shall not commence before the readiness date stipulated in Part I hereof, except with the Charterer's sanction, and should the Vessel not be ready to load by 4:00 o'clock P. M. (local time) on the cancelling date stipulated in Part I hereof, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect.

4. NOTICE OF READINESS.—The Master or his representative shall give the Charterer or his agent at the ports of loading and discharge notice in writing during ordinary business hours that the Vessel is ready to load or discharge cargo, berth or no berth, and lay time shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i. e., finished mooring when at a sealoading or discharging terminal, and all fast when loading or discharging alongside a wharf), whichever first occurs; provided, however, that where, because of routing instructions or other orders of the Owner over which the Charterer has no control, delay is caused to the Vessel for more than six (6) hours after notice of readiness is given, in waiting turn to load or discharge, lay time shall not commence until Vessel is berthed.



5. HOURS FOR LOADING AND DISCHARGE.—Such number of running hours as are stipulated in Part I hereof shall be allowed the Charterer as lay time for loading and discharging cargo; but if the Vessel's condition or facilities do not admit of loading and discharging in the time allowed, then the additional time necessary therefor shall be included in lay time. If regulations of the owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used lay time; if the Charterer, Shipper or Consignee prohibits loading or discharging at night, time so lost shall count as used lay time.

6(a). SAFE BERTH.—The Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and secured by the Charterer, any lighterage being at the expense, risk and peril of the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all expenses incurred, except as stated in Clause 14 hereof. Time consumed on account of shifting shall count as used lay time, except as stated in Clause 14.

6(b). FLASHPOINT.—No petroleum or its products having a flashpoint under 150° Fahrenheit (Closed Cup Abel Test) shall be loaded from lighters but this clause shall not restrict the Charterer from loading or topping off crude oil from vessels or barges inside or outside the bar at any port or place where bar conditions exist.

7. PUMPING IN AND OUT.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense



of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee. The Vessel shall supply her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or Consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel.

8. **HOSSES.**—Hoses for loading and discharging to be furnished by Charterer at its risk and expense.

9. **DEADFREIGHT.**—Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's option, and shall, upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however, dead freight shall be paid on the difference between the quantity loaded and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

10. **DEMURRAGE.**—Charterer shall pay demurrage per running hour and prorata for a part thereof at the rate stipulated in Part I for all time that loading and discharging and used lay time as elsewhere herein provided exceeds the allowed lay time herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge because of fire or explosion in or about the plant, or be-

cause of breakdown of machinery, of the Charterer, shipper, or consignee of the cargo, the rate of demurrage shall be reduced to one-half the rate stipulated in Part I hereof per running hour and prorata of such reduced rate for part of an hour for demurrage so incurred.

11. DUES, WHARFAGE.—Dues and other charges on the cargo shall be paid by the Charterer, and dues and other charges on the Vessel shall be paid by the Owner. The Vessel, however, shall always be free of wharfage, dockage, and quay dues.

12. PREVIOUS CARGO.—The last two successive cargoes carried, or to be carried, by the Vessel immediately preceding her entering upon this Charter consisted, or will consist, of cargoes as stipulated in Part I hereof.

13. PRODUCTS EXCLUDED.—No product shall be shipped which fails to meet one or the other of the two following requirements: (1) The vapor pressure at one hundred degrees Fahrenheit (100° F.) shall not exceed thirteen pounds (13 lbs.) as determined by the A. S. T. M. Method (Reid Method) identified as D-323 current at the time shipment is made. (2) The distillation loss shall not exceed four per cent (4%) and the sum of the distillation loss and the distillate collected in the receiving graduate shall not exceed ten per cent (10%) when the thermometer reads one hundred twenty-two degrees Fahrenheit (122° F.). Note—The distillation test shall be made by A. S. T. M. Method identified as D-86 current at the time shipment is made. When products other than Naphtha or Gasoline are tested, the distillation loss may be determined by distilling not less than twenty-five per cent (25%) and deducting from one hundred per cent (100%) the sum of the volumes of the distillate and the residue in the flask

(cooled to a temperature of sixty degrees Fahrenheit (60° F.).)

14. TWO PORTS COUNTING AS ONE.—The following two ports, viz., Paulsboro (New Jersey), and Marcus Hook (Pennsylvania), Paulsboro (New Jersey), and Wilmington (Delaware), Beaumont and Sabine (Texas), Baytown and Texas City (Texas), Ingleside and Harbor Island (Texas), and Baton Rouge (Louisiana) and a safe port on the Mississippi River below Baton Rouge, respectively, shall count as one port, and all expenses incurred in shifting from Paulsboro to Marcus Hook, Paulsboro (New Jersey) to Wilmington (Delaware), or vice versa, or from Beaumont to Sabine, or from Baytown to Texas City, or from Ingleside to Harbor Island, or from Baton Rouge to a safe port on the Mississippi River below Baton Rouge or vice versa, shall be for account of the Owner, except that any extra port charges incurred by reason of calling at the second port in each group shall be for account of the Charterer. Time consumed in shifting shall not count as used lay time.

15. ICE.—In case port of loading or discharge shall be inaccessible owing to ice, the Vessel shall direct her course according to Master's judgment, notifying by telegraph or radio, if available, the Charterer, Shipper or Consignee, who is bound to telegraph or radio orders for another port (at its option), which is free from ice, and where there are facilities for the loading or reception of Petroleum in bulk. The whole of the time occupied from the time the Vessel is diverted by reason of ice until her arrival at an ice-free port of loading or discharge as the case may be shall be paid for by the Charterer at the rate stipulated in Part I hereof.



16.—If on Vessel's arrival off the port of loading or discharge there is danger of the Vessel being frozen in, the Master shall communicate by telegraph or radio, if available, with the Charterer, Shipper or Consignee of the cargo, who shall telegraph or radio him in reply, giving orders to proceed to another port as per Clause 15, where there is no danger of ice and where there are the necessary facilities for the loading or reception of Petroleum in bulk, or to remain at the original port at their risk, and in either case Charterer to pay for the time that the Vessel may be delayed, at the rate stipulated in Part I hereof.

17. QUARANTINE.—Should the Charterer send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used lay time; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay.

18.—If the Vessel, prior to or after entering upon this Charter, has docked or docks at any wharf which is not rat-free or stegomyia-free, she shall, before proceeding to a rat-free or stegomyia-free wharf, be fumigated by the Owner at his expense, except that if the Charterer ordered the Vessel to the infected wharf he shall bear the expense of fumigation.

19. CLEANING.—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count



as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, nor for any consequences arising out of shipping more than one grade of cargo.

20(a). ACT OF GOD, ETC.—The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage, or delay or failure in performing hereunder, arising or resulting from:—any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, Shipper or Consignee of the cargo, their agents or representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from

any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from:—Act of God; act of war; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.

20(b). WATER BALLAST.—Charges for handling, storing or disposing of water ballast at loading port to be for account of Charterer.

20(c). TAXES.—Any Habilitation tax, customs overtime, and taxes on freight at loading or discharging ports, also any unusual taxes, assessments and governmental charges that are not presently in effect but in the future may be imposed on the vessel or freight are to be borne by Charterer.

21. JASON CLAUSE.—In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Owner is not responsible by statute, contract, or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is

owned or operated by the Owner, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

22. GENERAL AVERAGE.—General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the Owner, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the Owner, must be furnished before delivery of the cargo. Such cash deposit as the Owner or his agents may deem sufficient as additional security for the contribution of the cargo and for any salvage and special charges thereon, shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owner before delivery. Such deposit shall, at the option of the Owner, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money.

23. DEVIATION.—The Vessel shall have liberty to call at any ports in any order, to sail with or without pilots,



to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner.

24. **BILLS OF LADING.**—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter. The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders.

25. **CLAUSE PARAMOUNT.**—All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.

26. **BOTH TO BLAME.**—If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master,



mariner, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying ship or her Owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her Owners to the owners of said cargo and set off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against the carrying ship or Owner. The foregoing provisions shall also apply where the Owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

27. LIEN.—The Owner shall have an absolute lien on the cargo for all freight, dead freight, demurrage and costs, including attorney's fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bills of Lading covering the same, or of any storageman.

28. AGENTS.—The Owner shall appoint Vessel's agents at all ports.

29(a). WAR CLAUSE.—In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Owner or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the Vessel or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of

discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the Owner may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the cargo at port of shipment and upon their failure to do so, may warehouse the cargo at the risk and expense of the cargo; or the Owner or Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master or the Owner may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place; or the Owner or the Master may retain the cargo on board until the return trip or until such time as the Owner or the Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or the Owner or the Master may discharge and forward the cargo by any means at the risk and expense of the cargo. The Owner or the Master is not required to give notice of discharge of the cargo, or the forwarding thereof as herein provided. When the cargo is discharged from the Vessel, as herein provided, it shall be at its own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Owner shall be freed from any further responsibility. For any service rendered to the cargo as herein provided the owner shall be entitled to a reasonable extra compensation.

29(b).—The Owner, Master and Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the Vessel, the right to give such orders or directions. Delivery or other disposition of the cargo in accordance with such orders or directions shall be a fulfillment of the contract voyage. The Vessel may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

29(c).—In addition to all other liberties herein the Owner shall have the right to withhold delivery of, reship to, deposit or discharge the cargo at any place whatsoever, surrender or dispose of the cargo in accordance with any direction, condition or agreement imposed upon or exacted from the Owner by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the cargo shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the owner or consignee thereof and shall be a lien on the cargo.

30. PRIORITY.—All agreements of the Owner contained in this Charter Party shall be subject to any orders or instructions of priority or requisition issued by the United States Government or the Government of the flag of the Vessel or any agencies thereof, or the requirement of naval or military authorities or other Agencies of Government.



31. LIMITATION OF LIABILITY.—Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owner or Chartered Owner of vessels by any statute or rule of law for the time being in force.

32. APPROVAL.—The voyage under this Charter is subject to the approval of the War Shipping Administration and any conditions imposed by said Administration pursuant to the Ship Warrants Act (Public Law 173, 77th Congress).

33. ASSIGNMENT.—Subject to the approval of War Shipping Administration, the Charterer shall have the option of subletting or assigning this Charter to any individual or company, but the Charterer shall always remain responsible for the due fulfillment of this Charter in all its terms and conditions.

34. BREACH.—Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder.

35. MEMBERS OF CONGRESS.—No member of or delegate to the Congress, nor Resident Commissioner, shall be admitted to any share or part of this Charter or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909.

36. DEFINITION OF "OWNER".—Wherever the word "Owner" appears herein same shall be deemed to include a Time Charterer, Demise Charterer, or a Requisition Charterer or user.

37.—This Charter Party consists of this Part II and of Part I on the reverse hereof. Unless in this Part II



otherwise provided, all of the provisions of said Part I shall be part of this Charter Party as though fully incorporated herein. In the event of conflict between the provisions of this Part II and those of Part I, the provisions of Part I shall govern to the extent of such conflict.

### BILL OF LADING.

Shipped in apparent good order and condition by.....  
on board the .....  
Motorship .....  
Steamship .....  
whereof ..... is Master,  
at the port of.....  
to be delivered at the port of.....  
or so near thereto as the Vessel can safely get, always  
afloat, unto .....  
or order on payment of freight at the rate of.....  
This shipment is carried under and pursuant to the terms  
of the Charter dated .....  
at..... between.....  
and..... as Charterer, and  
all the terms whatsoever of the said Charter except the  
rate and payment of freight specified therein apply to and  
govern the rights of the parties concerned in this ship-  
ment.

In Witness Whereof, the Master has signed.....  
..... Bills of Lading of this tenor and  
date, one of which being accomplished, the others will  
be void.

Dated at..... this.....  
day of.....

Master

Bill of Lading No.....

Shipped in apparent good order and condition by Standard Oil Company of California on Board the American Steamship "EGG HARBOR" whether L. C. Olsen is master, at the port of Los Angeles, California.

Part Cargo "STANDARD DIESEL FURNACE OIL" in bulk;  
60,933.31 Net Barrels 60° F.  
8,224.23 Long Tons  
API Gravity 32.2.

to be delivered at the Port of....., or so near thereto as the vessel can safely get, always afloat, unto .....pursuant to terms of contract/charter dated As Agreed

in witness whereof the master has signed One (1) bills of lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at San Pedro, California this 17th day of April, 1943.

L. C. OLSEN  
Master.

[The following clauses are rubber-stamped on the face of the document]:

This document contains information affecting the national defense of the United States within the meaning of the Espionage Act, 50 U. S. C., 31 and 32 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.

This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Bill of Lading No.....

Shipped in apparent good order and condition by Standard Motorship Oil Co. of California on board the American Steamship "EGG HARBOR" whereof L. C. Olsen is master, at the Port of El Segundo, California.

Part Cargo Standard Gasoline (Summer Grade) in Bulk:

63,789.52 Gross 42 Gallon Barrels at 60° F.

7,353.34 Long Tons

60.1 A. P. I. Gravity

to be delivered at the Port of....., or so near thereto as the vessel can safely get, always afloat, unto .....pursuant to terms of contract/charter dated as agreed

in witness whereof the master has signed One (1) bills of lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at El Segundo, California this 18th day of April, 1943.

L. C. OLSEN  
Master

[The following clause is rubber-stamped on the face of the document]:

This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.



No. 11126

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

*Appellee.*

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## APPELLEE'S BRIEF.

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PILLSBURY, MADISON & SUTRO,

LAWLER, FELIX & HALL,

FELIX T. SMITH,

JOHN A. SUTRO,

JOHN M. HALL,

800 Standard Oil Building, Los Angeles 15,

*Proctors for Appellee.*

FILED

APR - 1 1948



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No. 11126  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,  
*Appellee.*

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APPELLEE'S BRIEF.

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Statement Showing Jurisdiction.

Appellee sued in the District Court under the Suits in Admiralty Act (46 U. S. C. A. secs. 741-752, incl.). Its libel so alleged (4).<sup>1</sup> These allegations of the libel were admitted by the answer (7). The District Court had jurisdiction of the cause under section 2 of the Suits in Admiralty Act (46 U. S. C. A. sec. 742).<sup>2</sup>

This Court has jurisdiction of this appeal under the appeal statute (28 U. S. C. A. sec. 225, subdv. (a) First and (d)) which applies to final decrees in admiralty.

Appellant's Opening Brief (p. 2, *et seq.*) correctly states the statutory provisions and pleadings necessary to show the existence of jurisdiction.

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<sup>1</sup>Numbers in parenthesis, unless otherwise noted, refer to pages of the Apostles on Appeal. References to "Brief" are to pages of Appellant's Opening Brief. Italics throughout have been added.

<sup>2</sup>In *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692, 698 (9 C. C. A., 1945), this Court has pointed out that this section "makes provision for the United States' liability both as a common carrier and, . . . a private carrier . . . ."



### Statement.

In addition to the "Statement of Facts" which will be found in Appellant's Opening Brief (p. 4, *et seq.*) attention is invited to the following:

The District Court found that appellant, before and at the beginning of the voyage, and also during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man or equip or supply the vessel, or make the parts thereof in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47).

These findings were supported by the evidence. As stated in the opinion of the District Court appellant at no time made any explanation accounting for the contamination, and, although its representatives inspected the vessel shortly after the contamination was discovered, would admit nothing, except that the cross-over valves on tank 5 were found partly open (34). The District Court also stated that appellant was guilty of a failure to exercise due diligence in not using spectacle flanges (33, 34).

These findings are not attacked either by the assignment of errors (59, *et seq.*) upon which appellant relies (342), or by the argument in Appellant's Opening Brief.<sup>3</sup>

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<sup>3</sup>One assignment of error touches a single feature of this, *viz.*, No. 14, which declares that the "District Court erred in finding that respondent failed to exercise due diligence to make the vessel seaworthy by not using spectacle flanges during the voyage and discharge." (61) However, this assignment of error is not made the basis of any argument or contention in the opening brief.



Accordingly it is undisputed that the damage complained of occurred because appellant:

(A) Failed to exercise due diligence to make the vessel seaworthy, and

(B) Failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and

(C) Negligently and improperly handled, carried, cared for and discharged the cargo.

Nor is there any dispute concerning bases or computations employed in arriving at the damages, except that appellant contends (Brief 26, *et seq.*) that appellee was not legally entitled to a part of the damages so based and computed, and (Brief 38, *et seq.*) that appellee was not entitled to recover attorneys' fees, and that the award thereof was excessive.

Argument herein for affirmance of the judgment will be addressed to the following points:

I. The Carriage of Goods by Sea Act governed the rights and duties of the parties, and appellant was liable for a breach of such duties.

II. Even if the Carriage of Goods by Sea Act had not been made a part of the contract of the parties, appellant was nevertheless liable for a breach of its duties as bailee for hire, despite paragraph 19 of the charter party.

III. Damages were properly allowed for the contaminated products discharged from the vessel and for the products already in the shore tanks into which such contaminated products were run.

IV. Damages allowed properly included the award on account of attorneys' fees.

ARGUMENT.

I.

**The Carriage of Goods by Sea Act Governed the Rights and Duties of the Parties, and Appellant Was Liable for a Breach of Such Duties.**

- (1) **The Charter Party Made the Carriage of Goods by Sea Act a Part of the Contract of the Parties, Paramount Over Any Part of Such Contract in Conflict Therewith.**

By its terms the Carriage of Goods by Sea Act of April 16, 1936 (46 U. S. C. A. sec. 1300, *et seq.*) is made applicable "to all contracts for carriage of goods by sea to or from parts of the United States in foreign trade." By its terms it is also made applicable to contracts for the carriage of goods by sea between ports of the United States if the "bill of lading or similar document of title which is evidence of a contract for the carriage of the goods" contains "an express statement that it shall be subject to" the provisions of the Act (46 U. S. C. A. sec. 1312).

In the instant case the charter party includes a "clause paramount" (par. 25), which provides that the Carriage of Goods by Sea Act shall be deemed to be incorporated in all bills of lading issued under such charter party. This clause reads as follows:

"25. Clause Paramount. All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities

under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.” (Brief, Appendix 25.)

This mandate of the charter party that the bills of lading “shall have effect subject to” the Act was carried out by Captain Olsen of the Egg Harbor in issuing bills of lading on April 17, 1943 and April 18, 1943 at San Pedro and El Segundo. These bills of lading contained a rubber-stamped clause reading:

“This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.”<sup>4</sup> (19, 20.)

Under the Carriage of Goods by Sea Act the parties were authorized to contract so as to make the Act a part of their contract of carriage. They did so in the exact

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<sup>4</sup>A clause in this form, rubber-stamped on the margin of a bill of lading, was considered in *The Steel Inventor*, 35 F. Supp. 986, 997 (Md. 1940), where it was held that such *rubber-stamped* clause prevailed over a clause in conflict therewith *printed* in the bill of lading. See, also, *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. (2d) 740, 744 (9 C. C. A. 1931), to the effect that a stipulation stamped on the face of a bill of lading is deemed a part of such bill and is binding on the parties.



method prescribed by the Act.<sup>5</sup> It should be noted that 46 U. S. C. A. sec. 1312 does not expressly provide for incorporating the Act in the charter party itself, but provides that any *bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea* between ports of the United States, containing an express statement that it shall be subject to the provisions of the Act, shall be subject thereto. In compliance with this express statutory authority and with the method thereby prescribed, the charter party provided in par. 25 that all bills of lading issued thereunder should have effect subject to the provisions of the Act. The actual form of the bill of lading was also prescribed in the charter party itself, and par. 24 of the charter party authorized its issue by the Master. Par. 25 further states that "nothing therein or *herein* contained [meaning nothing in the bill of lading or in the charter party] shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act." It is difficult to imagine a more com-

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<sup>5</sup>The Act (46 U. S. C. A., Sec. 1312) reads:

" . . .

"Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and Section 25 of Title 49, shall be subject hereto as fully as if subject hereto by the express provisions of this chapter and Section 25 of Title 49:".

Section 25 of Title 49 referred to above related to the filing with the Interstate Commerce Commission of quotations of rates for scheduled sailings by common carriers by water in foreign commerce, and the reservation by railroads of space at such rates in the vessels of such carriers, and the issuance of through bills of lading covering such rail and water shipments, etc. This section was repealed September 18, 1940, by 54 Stat. 919.



prehensive method of incorporating the Act into the contract of carriage and it is submitted that the representatives of the Government who drafted the charter party fully intended to make the Act a part thereof and, to remove any doubt on this score, adopted the precise method of incorporating its terms set forth in the Act itself.

Appellant's argument is that the bill of lading should be treated as a receipt in this case, because the charter party was one of private carriage under which appellee had the use of the entire cargo space of the vessel, and in support of this contention relies on *The G. R. Crowe*, 294 Fed. 506 (2 C. C. A. 1924), and *The Fri*, 154 Fed. 333 (2 C. C. A. 1907). In both of those cases, however, the bill of lading which was issued conflicted with the charter party, and the Court held in each case that the terms of the bill of lading would not be permitted to alter the terms of the charter party, because the charter party expressed the entire contract of carriage between the parties. Obviously, this is not the situation in the present case, as here the charter party itself sets forth the terms and the form of the bill of lading. The bill of lading, or document of title, or, to use the contention of appellant, the "receipt," was issued pursuant to the express authority and in conformance with the express terms of the charter party. Whether the document issued as authorized and in the form prescribed by the charter party was a bill of lading, as it was entitled, or a receipt is immaterial in this case because its issuance and its terms and conditions are authorized by the contract of carriage and hence they became part of the contract of carriage.

Since the Carriage of Goods by Sea Act was a part of the contract between the parties, par. 19 of the charter party may not be availed of to relieve appellant from liability for a breach of its duties under the Act.<sup>6</sup>

The Act expressly forbids any impairment or curtailment of the carrier's statutory obligations.<sup>7</sup> Moreover, the charter party by express language made the Act "paramount" over other charter party clauses, *i. e.*, the paragraph in the charter party (par. 25) which made the Act applicable to this shipment was labeled "paramount." By this the parties obviously intended that the Act should prevail in the event of any conflict between a charter party clause and the Act. Otherwise the word "paramount" is meaningless.<sup>8</sup>

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<sup>6</sup>Par. 19 of the charter party purports to relieve the vessel from responsibility "for any consequences arising out of shipping more than one grade of cargo." (Brief, Appendix 11.)

<sup>7</sup>The Act reads (46 U. S. C. A., Sec. 1303 (8)):

*"(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."*

Section 25 of Title 49 referred to in the foregoing related to the filing with the Interstate Commerce Commission of quotations of rates for scheduled sailings by common carriers by water in foreign commerce, and the reservation by railroads of space at such rates in the vessels of such carriers, and the issuance of through bills of lading covering such rail and water shipments, etc. This section was repealed September 18, 1940, by 54 Stat. 919.

<sup>8</sup>The word "paramount" is defined as: "Having a higher or the highest rank or jurisdiction; superior to all others; chief, supreme; pre-eminent." Webster's New International Dictionary, 2nd Ed. (1940), p. 1773.

The following cases presented substantially the following situation: (A) a private carrier; (B) a contract of carriage making the shipment subject to the provisions of the statute;<sup>9</sup> and (C) a provision of the contract of carriage under which the carrier claimed immunity but which appeared to be at variance with the carrier's obligations under the statute. Each of these cases held that the immunity provision *must yield to the statutory obligation*.

In *The Framlington Court*, 69 Fed. (2d) 300 (5 C. C. A. 1934; *certiorari* denied in 292 U. S. 651), the charter party expressly incorporated the Harter Act. The charter party also expressly provided that the vessel might "sail without pilots." The vessel stranded while on her way to sea without a pilot. A libel was brought against the vessel by a shipper who had chartered the entire vessel and whose goods were lost or damaged, as a result of the stranding. In reversing a judgment dismissing the libel, the court pointed out that the provision that the vessel might "sail without pilot" was inconsistent with and must give way to the general obligation to use due diligence to render the vessel seaworthy incorporated in the charter by the charter's adoption of the Harter Act.

In *The Agwimoon*, 24 Fed. (2d) 864 (Md., 1928; aff. in 31 Fed. (2d) 1006), an oil tanker was carrying a cargo from California to Baltimore under a charter party which declared that the shipment was subject to all of the terms of the Harter Act. The charter party also provided: "The steamer is not to be accountable for leakage."

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<sup>9</sup>In each of these cases the statute incorporated as a part of the contract of carriage was the Harter Act (46 U. S. C. A., Secs. 190-194, incl.).



When the tanker arrived at Baltimore, a part of the cargo was found to have been lost by leakage. Libel was brought by the purchaser of the oil to recover for such loss.

The Court said (p. 867):

“ . . . The final question is whether the leakage clause operates to relieve the vessel from liability.”

\* \* \* \* \*

“The parties have agreed to make the act applicable to their contract, and have expressly incorporated it, not merely in the bill of lading, as was the case in *The G. R. Crowe*, *supra*, upon which respondent relies, but in the charter party itself. If the act is not effectuated in the same manner, that it would be for a common carrier—that is, in all its terms—then the agreement amounts to nothing.”

In *The Cornelia*, 15 Fed. (2d) 245 (N. Y., 1926), a libel was filed by the consignee of a cargo for damage thereto by sea water. By the contract of carriage it was mutually agreed that such contract should be subject to all the terms and provisions of the Harter Act. In decreeing in favor of libellant, the Court said (p. 247):

“The regular form of bill of lading, of which a copy was annexed to the contract of carriage, and under which the shipment was made, contains an exemption from liability for loss or damage occasioned by sea water, wetting, drainage, leakage, or wastage. The loss in this case was clearly within the language of this exemption, . . . Respondent contends that the exemption applies, unaffected by the provisions of sections 1 and 2 of the Harter Act, because in so far as full cargoes are concerned *the contract was one of private carriage*, relying upon *The G. R. Crowe* (C. C. A.), 294 F. 506, and similar decisions.



*But here the parties agreed that their contract should be governed by all the provisions and exemptions of that act. Necessarily exemptions contained in the contract and in the bills of lading, the provisions of which were embodied in the contract, are, as the parties agreed they should be, subject to the provisions of the Harter Act, not because the agreement of carriage is a shipping document within the meaning of that statute, but because the parties themselves agreed that the statute should apply to their contract of carriage. The contract of carriage thus being subject to the provisions of the Harter Act, its exemptions cannot relieve the vessel or her owners from liability for loss or damage arising from negligence in proper loading, stowage, custody or care of the cargo, or from failure to exercise due diligence to make the vessel seaworthy."*

In *The Ferncliff*, 22 F. Supp. 728 (Md., 1938; aff. in 105 Fed. (2d) 1021), a charter party executed by a private carrier contained a provision that it should be "subject to all the terms and provisions of" the Harter Act. The carrier claimed immunity under a bill of lading clause exempting the carrier from liability for loss due to "heating," the cargo loss in this case having been due to heating. It was pointed out (p. 736) that if the Harter Act were applicable, this bill of lading clause must be held to be invalid. In decreeing for libelants, the Court said (p. 737):

"The ship contends that these sections of the Harter Act are not applicable because, the ship having been wholly chartered for this voyage by Mitsubishi, was a private and not a common carrier. . . . And it has been frequently held that a private carrier by water may make its own contract for carriage includ-

ing an exemption from liability for its own negligence, and will not be bound by the Harter Act unless it is expressly incorporated in the charter agreement. . . . This contention, however, seems untenable as I find on examination of the charter party that it provides—  
‘It is also mutually agreed that this contract is subject to all the terms and provisions of, and all the exemptions from liability contained in an Act of Congress of the United States approved on the 13th day of February, 1893, entitled “An Act Relating to Navigation of Vessels, etc.”’ (the Harter Act). As the ship is basing its position in this respect on the charter party, it cannot escape the particular provision of the charter with regard to the Harter Act.”

**(2) The Charter Party Must Be Strictly Construed Against Appellant.**

It is our contention that par. 25 of the charter party is not ambiguous; that it discloses a clear intent to make the Carriage of Goods by Sea Act a part of the contract of carriage.

However, if par. 25 is ambiguous, such ambiguity must be resolved against appellant.

The charter party here involved was drawn by agents of appellant. It is on a printed form headed “Form No. 104—Warshipoilvoy 6/1/42.” Use of this form was required by an order of the War Shipping Administration which is published in the Federal Register of June 10, 1942, p. 4386, *et seq.* Such order sets forth *in extenso* all

of the paragraphs of Part II, as well as the form of Part I, of such charter party.<sup>10</sup>

Also, contrary to the suggestion in appellant's brief (pages 10, 11), that the bills of lading were prepared by appellee, the bills of lading signed by Captain Olsen were in the form prepared by appellant and prescribed by the charter party. All appellee did was to fill in the appropriate blank spaces, which in no way affected the terms and conditions contained in the form itself.

Not only was the contract prepared by agents of appellant, but if any contract at all were to be concluded it was requisite that the prescribed form be adopted.

A contract between a corporation and the United States is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals.

*Reading Steel Casting Co. v. United States*, 268 U. S. 186, 188 (1925).

Accordingly it has been held that where a contract between the United States and a corporation has been drawn by agents of the United States it must be construed most strongly against the United States.

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<sup>10</sup>Such order, exclusive of recitals and the form of the charter party prescribed, is as follows:

"Now, therefore, it is hereby ordered, That:

"§301.2a. *Uniform tanker voyage charter party*. (a) Voyage charters entered into by the United States of America, acting by and through the Administrator, War Shipping Administration, or his duly appointed agents, for the carriage of Petroleum and/or its products in bulk on vessels the use of which has been requisitioned or acquired by the United States on a time charter basis, shall consist of two parts, designated respectively, Part I and Part II.

"(b) The form of Part I of said voyage charter shall be as follows:"



*Scully v. United States*, 197 Fed. 327, 343 (Nev. 1912);

*United States v. A. Bentley & Sons Co.*, 293 Fed. 229, 235 (Ohio, 1923, aff. in 16 Fed. (2d) 895).

**(3) Appellant Breached the Duties Imposed Upon It Under the Carriage of Goods by Sea Act.**

As to this there can be no dispute in view of the findings which are unassailed.

As heretofore pointed out, the District Court found that appellant, before and at the beginning of the voyage, and during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man or equip or supply the vessel, or make the parts therein in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47).

Appellant's Opening Brief does not attack these findings.

These findings disclose a clear breach of the carrier's obligations under the Carriage of Goods by Sea Act.<sup>11</sup>

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<sup>11</sup>This Act (46 U. S. C. A., Sec. 1303) reads in part:

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

" . . . "



II.

Even If the Carriage of Goods by Sea Act Had Not Been Made a Part of the Contract of the Parties, Appellant Was Nevertheless Liable for a Breach of Its Duties as Bailee for Hire, Despite Paragraph 19 of the Charter Party.

- (1) If the Act Had Not Been Expressly Made a Part of the Contract of Carriage, the Relation of the Parties Would Have Been That of Bailor and Bailee for Hire.

Parties to a private carrier contract may make the Carriage of Goods by Sea Act a part of their contract.<sup>12</sup>

Assume, for the purposes of argument only and without conceding, that in this case the Carriage of Goods by Sea Act was not a part of the contract and does not govern the rights and duties of the parties, the case presented is that of bailor and bailee, and the rights and duties of appellant were those of a bailee for hire.<sup>13</sup>

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<sup>12</sup>See *The Framlington Court*, 69 F. (2d) 300 (5 C. C. A. 1934); *The Agæimoon*, 24 F. (2d) 864 (Md., 1928, aff. in 31 F. (2d) 1006); *The Cornelia*, 15 F. (2d) 245 (N. Y., 1926); and *The Ferncliff*, 22 F. Supp. 728 (Md., 1938, aff. in 105 F. (2d) 1021), previously cited, in which the Harter Act was made a part of the charter party, and in which the Act was held to control over inconsistent contract clauses under which the carrier claimed immunity.

<sup>13</sup>*Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104, 110, 111 (1941); *The Fri*, 154 Fed. 333, 338 (2 C. C. A. 1907); *The Wildenfels*, 161 Fed. 864, 866 (2 C. C. A. 1908); *The C. R. Sheffer*, 249 Fed. 600, 601 (2 C. C. A. 1918); *The G. R. Crowe*, 294 Fed. 506, 508 (2 C. C. A. 1923); *The W. H. Davis*, 56 F. Supp. 564, 567 (N. Y., 1944).

(2) Appellant Breached the Duties Imposed Upon It as a  
Bailee for Hire.

As already pointed out, the District Court found that appellant, before and at the beginning of the voyage, and during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man, equip or supply the vessel, or make the parts thereof in which cargo was carried fit or safe for the reception of the same, or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47), and that these findings are not attacked.

A bailee of goods for hire is certainly liable for these breaches of duty.<sup>14</sup>

The only remaining question is whether appellant was relieved of liability by par. 19 of the charter party.

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<sup>14</sup>Speaking of the obligations of a shipowner under a private contract of carriage it was said in *Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104, 110 (1941): "But, as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His undertaking is to exercise the care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner."

See, also, *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (9 C. C. A. 1945), where the government undertaking to act as a private carrier was held liable for negligence.

(3) Under the Facts Presented, Paragraph 19 of the Charter Party Did Not Relieve Appellant From Liability for a Breach of Its Duties as a Bailee for Hire.

Appellant's contention is that par. 19 of the charter party states that the vessel "shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo;" that the contamination which occurred in this case was a "consequence arising out of shipping more than one grade of cargo;" (Brief, Appendix 11) hence the carrier was not liable. (Brief 22, *et seq.*)

Appellant's contention is contrary to the finding of the District Court that the contamination complained of was the "direct and proximate result" of appellant's negligence and failure to exercise due diligence, and "*not . . . a consequence arising out of shipping more than one grade of cargo*" (46, 47).

It is submitted that appellant's contention is not well taken.

This clause in par. 19 of the charter party must be construed most strongly against the carrier. As said in *The Framlington Court*, 69 Fed. (2d) 300, 303 (5 C. C. A. 1934; *certiorari* denied in 292 U. S. 651), where the vessel was not a common carrier:

*"Any exception in the charter in favor of the ship-owner is to be most strongly construed against him, especially if it tends to weaken the warranty of seaworthiness."*<sup>15</sup>

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<sup>15</sup> To the same effect, see *Compania la Flecha v. Brauer*, 168 U. S. 104, 118 (1897); *The Caledonia*, 157 U. S. 124, 137 (1895).

Also note the authorities hereinbefore cited under point I (2) to the effect that the charter party here involved must be strictly construed against appellant.



Construed most strongly against the carrier, this clause in par. 19 of the charter party has no application, for the mingling of the two products was not a "consequence arising out of *shipping*" more than one grade of cargo. The fact that two products were shipped did not occasion the mingling. Cargoes of different kinds of petroleum products are frequently carried without any mingling of the several products. The mingling which occurred in this case was not, in the language of this clause, a "consequence arising out of shipping more than one grade of cargo," but was rather a consequence of the carrier's negligence and failure to exercise due diligence.

The construction of this clause contended for by appellant (*i. e.*, that the mingling which occurred was a consequence of the shipping of more than one grade of cargo, hence an injury for which the vessel was not responsible) would lead to serious consequences, manifestly contrary to the intent of the parties. If appellant's construction be correct and be carried to its logical conclusion, *the single fact that more than one product was carried would in every case relieve the carrier from liability for all damage to either product no matter how such damage occurred*. For example, if appellant's construction be correct, two products might have been put in the same tank and the carrier could nevertheless successfully urge its non-liability for the damage thus resulting on the ground that it was a "consequence" of more than one product being carried. This construction should not be accepted. This clause should be held to have no application to the mingling of the products involved in this suit caused by appellant's negligence and failure to exercise due diligence.



Appellant contends (Brief 25) that its construction of par. 19 of the charter party is reasonable because of war conditions prevailing when the charter was made. Of course war conditions called for the utmost speed in the handling of cargoes of petroleum products. But this very circumstance required even greater diligence and care in the handling of these cargoes, lest negligence should produce additional and unnecessary delay as it did in this case.<sup>16</sup> Certainly when speed in transfer was a prime requisite, it was more than usually disastrous for this cargo of gasoline and diesel to be rendered worthless by careless mingling, thus requiring the whole to be shipped back to the refinery for re-refining. Accordingly it is not fair to assume that the parties intended to insert in the charter a clause which might encourage carelessness by purporting to relieve the carrier and its agents from liability for carelessness.

Furthermore, every presumption should be indulged *against* a construction of par. 19 which would turn it into a stipulation freeing the carrier from liability *for its own negligence*. Even in the case of private carriers, the courts have shown a marked disinclination to construe exculpatory clauses of a general character so as to relieve the carrier from liability for its own negligence.

In *California Nav. & Improvement Co. v. Stockton Mill Co.*, 184 Fed. 369 (9 C. C. A. 1911) libelants made an oral contract with a transportation company to move flour from South Vallejo to Stockton for compensation at an

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<sup>16</sup>Cf. *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692, 696 (9 C. C. A. 1945), in which this Court pointed out that war conditions *emphasized* the necessity of a proper inspection of a government lighter carrying cocoa beans to a vessel in the harbor of Pago Pago.

agreed rate, which was less than the usual freight rate, such reduction being made in consideration of a condition of the contract that the flour should be carried in open barges *and at the libelants' risk*. The flour was damaged as a result of the negligence of the transportation company. Obviously, under this contract the transportation company was acting as a private carrier. The transportation company urged that libelants' agreement to assume risks relieved it from responsibility. Disallowing this contention and affirming a decree awarding damages this Court said (pp. 370, 371):

"The averments in the libel, that the appellant was employed to transport the flour in its character as a common carrier, and that the barge was unseaworthy, are superfluous, because another sufficient ground supports the decree of the District Court awarding damages to the libelants. Negligence of the appellant in failing to exercise due care for the safety and preservation of that part of the cargo which had been delivered into its custody is charged in the libel as a cause of the loss and ground of liability, and that charge is well sustained by proof of the facts recited in the foregoing narrative.

\* \* \* \* \*

The libelant is not shielded from responsibility for the consequences of its negligence by the agreement of the libelant to assume risks. That agreement, according to the evidence, was vague and uncertain, and no ultra liberal construction of the contract to shift responsibility from a wrongdoer deserves judicial sanction. By its undertaking the appellant became obligated to exercise ordinary care and diligence in handling the libelant's property and to furnish seaworthy barges and competent servants, and certainly

risk of loss by its failure to perform the contract in good faith was not contemplated as one of the risks assumed by the libelants.”

In *Colton v. New York & Cuba Mail S. S. Co.*, 27 Fed (2d) 671 (2 C. C. A. 1928), the Court, in affirming an award of damages for injury to a cargo shipped under a contract with the Ward Line, which stated that the shipment should be “at the sole risk of the owners of the goods,” said (p. 674):

“But, irrespective of whether the Ward Line was a common carrier, the defendants were properly held liable for their own negligence. The words, ‘at the sole risk of the owners of the goods,’ in a contract prepared by the Ward Line, which seeks to limit its liability, are to be strictly construed. *Smith v. Booth* (C. C. A.) 122 F. at p. 628. They do not in terms cover the *negligence* of the carrier, and were not held sufficient to avoid liability in *Vitelli v. Cunard S. S. Co.* (C. C. A.) 203 F. 697, and *The Ogeechee* (D. C.) 248 F. 803.”

In *The Ogeechee*, 248 Fed. 803 (Pa., 1918), the Court, decreeing recovery of damages for injury to a cargo, said (pp. 805, 807):

“By the agreement between the parties as disclosed by the bill of lading and the charter-party, it was provided that lighterage should be ‘at the risk and expense of the cargo.’



"Indeed, in view of the facts established by the evidence I deem it unimportant to the decision of this case whether the Ogeechee undertook the carriage of its cargo as a common carrier or only as an ordinary bailee for hire; for in either case there was such culpable negligence on the part of the respondent as to make her liable for the resulting damage."

The meaning of par. 19 relieving the vessel from responsibility "for any consequences arising out of shipping more than one grade of cargo" should be determined only after a consideration of the entire charter.

Par. 1(a) of the charter party contains warranties that the vessel is "tight, staunch and strong" and that "all pipes" are "in good working order," and that she is "in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the *exercise of due diligence*."<sup>17</sup> (Brief, Appendix 3.)

Par. 20(a) of the charter party provides that the vessel shall not, unless otherwise provided, "be responsible for any loss or damage . . . arising or resulting from . . . unseaworthiness of the vessel unless caused *by want of due diligence* on the part of the Owner to make the vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the *actual fault* or privity of the Owner. . . ." (Brief, Appendix 11, 12.)

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<sup>17</sup>These declarations were express warranties. *The Framlington Court*, 69 F. (2d) 300, 303 (5 C. C. A. 1934, certiorari denied in 292 U. S. 651); *The Nordhvalen*, 6 F. (2d) 883 (Md., 1925).



The foregoing certainly convey the clear implication that appellant *shall be liable* for loss or damage arising or resulting:

(A) Because the vessel was not fitted for the voyage because of her owner's failure to *exercise due diligence*.

(B) Because the vessel was not seaworthy because of the owner's *want of due diligence* to make her seaworthy.

(C) Because the vessel was not seaworthy because of the owner's *want of due diligence* to have her properly equipped and supplied.

(D) Because of some cause arising from the *actual fault* of the owner.

Certainly these clear implications showing an intent to make the ship owner liable in the event of its *fault or failure to exercise due diligence* should be considered in determining the intent and meaning of par. 19. If the latter is to be construed as relieving from liability whenever more than one grade of cargo was carried, *irrespective of the owner's fault or lack of due diligence*, then there is a conflict between par. 19 and other parts of the charter which, under the rules of construction here applicable, should be resolved against appellant. A proper construction and application of par. 19 to the facts of this case is that the damage was not a "consequence arising out of shipping more than one grade of cargo," but was a consequence of appellant's fault and lack of due diligence, for which par. 19 affords appellant no protection.

III.

**Damages Were Properly Allowed for the Contaminated Products Discharged From the Vessel and for the Products Already in the Shore Tanks Into Which Such Contaminated Products Were Run.**

Before the parties knew of the contamination 8,140 bbls. of contaminated gasoline from the vessel were run into shore tank 62, where it contaminated 11,339 bbls. of merchantable gasoline already in such tank (79, 248), and 23,131 bbls. of contaminated diesel from the vessel were run into shore tank 8, where it contaminated 2,376 bbls. of merchantable diesel already in such tank (79, 115, 248).

It is not disputed that the 11,339 bbls. of gasoline already in shore tank 62, and the 2,376 bbls. of diesel in shore tank 8 were good and merchantable products before the contaminated products from the vessel were run into these tanks.

Appellee claims and the District Court awarded it damages, not only for the contaminated products discharged from the vessel, but also for the damage to the previously uncontaminated products in shore tanks 62 and 8, into which the contaminated cargo was poured.

Appellant contends (A) that no damages should have been awarded for the contents of the shore tanks which were contaminated when contaminated products from the vessel were poured into them (Brief 32, *et seq.*), and (B) that in any event no damages should have been awarded with respect to a quantity of diesel which was run into shore tank 8 between 9:30 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943, since appellee was under

a duty to minimize damages with respect to such quantity. (Brief 36, *et seq.*)

It is submitted that these contentions are not well taken.

**(1) Damages Were Properly Allowed for the Contents of the Shore Tanks Which Were Contaminated When Contaminated Products From the Vessel Were Run Into Them.**

Appellant contends that after the diesel and gasoline left the vessel they were within appellee's exclusive possession and control; that by the terms of the charter party these products were at the risk and peril of the vessel only "so far as the vessel's permanent hose connections"; and that the damage to what was already in the shore tanks was not reasonably foreseeable, hence not within the contemplation of the parties. (Brief 32, *et seq.*)

As already pointed out, the District Court found that before and at the beginning of and during the voyage the appellant "negligently and improperly handled, carried, cared for and discharged said cargo," and that *as "a direct and proximate result" thereof* the appellee suffered the damage complained of (46, 47). This finding is not attacked.

It is our contention that the damage to the previously uncontaminated contents of the shore tanks was a probable and reasonably foreseeable result of the carrier's breach of duty.

From the circumstances the carrier must reasonably have known that upon the vessel's arrival at Point Wells the diesel and gasoline would be run into shore tanks at appellee's marine terminal. The carrier knew that appellee was a producer and distributor of petroleum pro-



ducts, and that the products carried would be run into shore tanks. There were no other receptacles which could accomodate this cargo. Moreover, the carrier knew that the products carried were fungible, and had every reason to foresee the possibility that upon arrival such products would be discharged into shore tanks which already contained like products. To say that the carrier had no reason to foresee this possibility is to say that the *only* reasonable possibility the carrier could foresee was that there would be empty tanks awaiting the arrival of the cargo. This would have been an unreasonable assumption on the part of the carrier. The oil business is not conducted on that basis. At least the carrier must reasonably have anticipated that the tanks into which the cargo was to be discharged *might* not be empty.

To hold appellant liable for the damage to the previously uncontaminated contents of the shore tanks it was not necessary that the circumstances which would produce this damage should have been mentioned in the negotiations between the parties at the time the charter was made. As said in 9 Am. Jur., p. 909, sec. 789 (article on "Carriers"):

"It is not always necessary, however, that the special facts actually within the contemplation of the parties should be mentioned in the negotiations, or in express terms made a part of the contract. Wherever they are known to the carrier, under such circumstances, *or they are of such a character that the parties may be fairly supposed to have them in contemplation* in making the contract, such special facts became relevant in determining the question of damages. It is not essential that the intended use and application of the goods to be carried should, in all cases, be expressly brought to the carrier's notice at



the time they are received, but the carrier may be liable whenever *such special use could be reasonably inferred from the known circumstances.*”

The following recent authority, very much in point, shows the propriety of permitting appellee to recover for the damage to the products in its shore tanks to which the vessel's contaminated cargo was added.

In *Armco International Corporation v. Rederi A/B Disa*, 151 Fed. (2d) 5 (2 C. C. A. 1945), a vessel carried a cargo consisting of iron plates and drums of acetic acid. The iron plates were in holds 1, 2, 3 and 4. During the voyage leaking of the acetic acid damaged the plates in holds 3 and 4. It was proved that iron plates would be damaged not only by contact with the acid but by its fumes. At the port of discharge the consignee loaded the plates “onto railroad cars, mixed all indiscriminately, regardless of the holds from which they had come;” thence they were conveyed to and stacked in a warehouse. Thus the plates from holds 3 and 4, being wet with the acid, contaminated and injured the plates from holds 1 and 2, although the latter before leaving the vessel had not been damaged by contact with the acid.

The carrier contended that it was not liable for the damage to the plates which were undamaged when they left the vessel. Disapproving this contention the Court said (p. 8):

“She [i. e., the vessel] insists, however, that in no event should she be held for damage to the cargo after it was discharged. There are two answers to this. First, as to the plates in holds numbers three and four, the difficulty remains that the ship cannot separate the damage done ashore from that

done on board. Next, *both as to those plates and to the plates from holds numbers one and two, the damage which did happen ashore was the direct result of the negligence of the ship while the plates were on board.* Whether the consignee later contributed to that damage is another matter, which we reserve for the moment, but the situation is not one of damage arising independently of the ship's own negligence before discharge. We know of no authority that liability for the consequences of such negligence ends when the cargo goes over the rail, and such a doctrine would be absurd to the last degree."

The following cases, more particularly discussed in the footnote,<sup>18</sup> support the same conclusion.

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<sup>18</sup>In *Dushane v. Benedict*, 120 U. S. 630 (1887), a rag dealer sold rags to a paper mill. When the rag dealer sued to recover the price of the rags, the mill operator sought recovery of a large sum by way of counterclaim for breach of plaintiff's agreement to deliver the rags free from infection. The mill operator alleged that the rags delivered were infected with smallpox; that when they were used smallpox broke out in the mill causing death and disability among the workmen, making it impossible to hire new workmen, and deterring customers from purchasing the mill's output; that the sum sought by way of counterclaim was for interruption and injury to the mill business, and for the money paid to workmen disabled by the disease. The trial court withdrew this counterclaim from the jury's consideration. This was held to be error and the judgment for plaintiff was reversed.

This case is evidently one of the cases cited by *Restatement of the Law—Contracts*, Sec. 330, to illustrate the rule of damages there laid down. Thus illustration 3 given in Sec. 330 is:

"3. A sells rags to B, with knowledge that B is a paper manufacturer, warranting them to be clean. They are in fact infected with smallpox, as A had reason to know. B's workmen catch the

*Dushane v. Benedict*, 120 U. S. 630 (1887);

*Davis v. Clement Grain Co.* (Tex. Civ. App.), 251 S. W. 545 (1923);

*Marsh v. Webber*, 16 Minn. 418 (1871);

*Jeffrey v. Bigelow*, 13 Wend. 518 (1835);

*Stiefel v. Witherspoon*, 71 Ind. App. 192, 124 N. E. 507 (1919);

*Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110 (1898).

Supporting our contention that appellant should be held to have reasonably foreseen the possibility that products from the vessel would be run into shore tanks which already contained uncontaminated gasoline and diesel, are

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disease, his mill runs shorthanded, and his production is decreased. *B can get judgment for damages for the harm so caused, as A had reason to foresee them.*"

In *Davis v. Clement Grain Co.* (Tex. Civ. App.), 251 S. W. 545 (1923), the plaintiff employed a carrier to transport hay. Due to the carrier's negligence in furnishing a car with a leaky roof a part of the hay was ruined. Plaintiff prayed recovery for the market value of that part of the hay which was ruined, and also prayed recovery for the additional sum of "\$26 damage to the balance of the hay by reason of its being intermingled in the same car with that totally destroyed." A judgment for the \$26 was affirmed.

In *Marsh v. Webber*, 16 Minn. 418 (1871), plaintiff purchased sheep from defendant which were diseased. Plaintiff, without knowing of the disease, placed these sheep with his own flock. As a result plaintiff's flock became infected. Plaintiff sued the defendant for damages for breach of defendant's warranty that the sheep sold were sound. Plaintiff was awarded damages not only on account of the diseased sheep which he had purchased, but also on account of the injury to the rest of plaintiff's flock by being infected by the sheep purchased. This judgment was affirmed.

Decisions to like effect upon facts substantially like those in the case last cited will be found in *Jeffrey v. Bigelow*, 13 Wend. 518 (1835), *Stiefel v. Witherspoon*, 71 Ind. App. 192; 124 N. E. 507 (1919), and *Snowden v. Waterman*, 105 Ga. 384; 31 S. E. 110 (1898).



the following cases more particularly discussed in the footnote.<sup>19</sup>

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<sup>19</sup>In *Sherrod v. Langdon*, 21 Iowa 518 (1866), defendant sold sheep to plaintiff warranting that the sheep were sound. Plaintiff placed the sheep with other sheep which he already owned. The sheep sold by defendant were diseased and imparted this disease to the other sheep in plaintiff's flock. Plaintiff sued for breach of warranty and recovered damages for the injury to his entire flock.

It was urged that plaintiff was not entitled to damages for injury to the sheep which plaintiff owned before the purchase unless it was shown that defendant knew at the time of the sale that plaintiff had other sheep, but the Court said (p. 519):

"Upon principle this position is not sustainable. Plaintiffs were entitled to recover all the damages of which the act complained of was the efficient cause . . . (p. 520). And upon the assumption that plaintiffs used the care and diligence required at their hands, *what matters it whether defendants knew that they had other sheep or not?* Or what difference would it make if plaintiff, in ignorance of the unsound condition of these sheep, had afterward bought other sheep, which they lost by reason of the disease communicated to them by those bought of defendants? Defendants sold the sheep with the knowledge that plaintiffs had a right to and probably would place them upon their farm; and, if guilty as charged, they would be held liable for the damages naturally and reasonably resulting from such act. It is known as a matter of fact, that most farmers in this State do keep sheep, and nothing is more important to their success than to secure good, sound flocks. If one lot is procured, there is no duty to refrain from purchasing others, lest those purchased may be unsound, and thus all be lost."

*Packard v. Slack*, 32 Vt. 9 (1859), upon substantially the same facts reached the same conclusion.

In *Harper Furniture Co. v. Southern Express Co.*, 148 N. C. 87; 62 So. 145 (1908), plaintiff had a mill for the manufacture of furniture. An engine shaft was shipped to plaintiff, but wrongfully delayed in transit. During the delay it was necessary to close the mill. Plaintiff claimed damages for wages paid to idle mill hands and other costs incident to such delay. Reversing a judgment of nonsuit, the Court held that these damages were properly recoverable, pointing out (62 So. at 148) that the title of the plaintiff's firm taken in connection with the nature of the implement shipped gave reasonable notice that plaintiff was a furniture manufacturer; that the size of the engine shaft necessarily gave notice of the capacity of the engine; and that the fact that it was shipped



*Sherrod v. Langdon*, 21 Iowa 518 (1866);

*Packard v. Slack*, 32 Vt. 9 (1859);

*Harper Furniture Co. v. Southern Express Co.*,  
148 N. C. 87, 62 So. 145 (1908);

*White v. Louisville & N. R. Co.*, 16 Ala. App. 515,  
79 So. 508 (1918).

Appellant refers (Brief 33) to the first sentence of par. 7 of the charter party. (Brief, Appendix 6, 7.)<sup>20</sup>

This paragraph refers only to damages *to the cargo*. *So far as damages to the cargo are concerned*, this paragraph says in effect that recovery may be had only for injury occurring on the vessel. This paragraph recog-

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by express rather than freight gave notice that the need for the shaft was urgent. The Court said:

"The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment . . . ."

In *White v. Louisville & N. R. Co.*, 16 Ala. App. 515; 79 So. 508 (1918), upon facts similar to those in the case last referred to, the Court, reversing a judgment for defendant, said (79 So. at 510):

". . . it is not essential that the intended use and application of the goods to be carried should be expressly brought to the carrier's notice at the time they are received. *It is sufficient that such special use could have been reasonably inferred at that time from the known circumstances.*"

<sup>20</sup>Par. 7 of the charter party quoted by appellant reads:

"Pumping In and Out.--The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.

". . . ."

nizes that damage to the cargo on the vessel would be a breach of the carrier's obligation.

But in the instant case the carrier's breach proximately caused other damage over and beyond the damage to the cargo. It proximately caused damage to the products in appellee's shore tanks which were never a part of the cargo. Paragraph 7 deals with the cargo and makes no attempt to deal with damages to something which was never cargo. To suggest that paragraph 7, which deals only with damage to cargo, forbids recovery of damage for something not cargo proximately caused by a breach of the carrier's duty, is to make the plain language of paragraph 7 say something it does not say, and to arrive at a result wholly at variance with paragraph 34 of the charter party which says that upon a breach of the charter "damages . . . shall include all provable damages, . . ."<sup>21</sup>

The only purpose intended by paragraph 7 was to fix the exact point of delivery of the cargo.

If the injury to the cargo had occurred on shore, then the case would have been different. But the injury to the cargo occurred on the vessel. For this appellee has a cause of action. For this appellee is entitled to "*all provable damages*" which may ensue. That there may be no doubt about this, this right is plainly stated in paragraph 34. The provable damages include not only the damage to the cargo injured by the carrier's negligence

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<sup>21</sup>Par. 34 of the charter party reads:

"Breach.—Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder." (Brief, Appendix 18.)

while the cargo was on the vessel, but also the damage to the uncontaminated product in the shore tanks which was likewise injured by the carrier's negligence on the vessel which injured the cargo.

Appellant's example of the "dire consequences" which might result from such a doctrine is obviously overstated (Brief 34, 35). The carrier is only liable for the *reasonably* foreseeable consequences of its negligence which is a matter to be determined from all the circumstances, and it is clear that the damages in this case were reasonably foreseeable consequences under the circumstances presented.

**(2) Damages Were Properly Allowed for the Diesel Which Was Run Into Shore Tank 8 Between 9:30 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943.**

Appellant contends that appellee failed to mitigate damages as to this quantity of *diesel* because, after discovering the contamination of the *gasoline* about 4:30 P. M. on April 23, 1943, it failed to stop discharging *diesel* until a laboratory test had been completed. (Brief 35, *et seq.*)

But appellee cannot be charged with a failure to mitigate damages unless it be shown that it had knowledge of facts requiring such action. Here appellee never had knowledge of facts which would warrant its ordering the discharge of *diesel* stopped.

The first diesel from the vessel was run into shore tank 8, commencing early in the afternoon of April 23, 1943 (78). Simultaneously gasoline from the vessel was being run into shore tank 62 (78). About 4:15 or 4:30 P. M. on that afternoon a sample taken at the dock header showed the *gasoline* to be badly discolored (80, 107, 118).



Pumping was stopped. The vessel's representatives, Messrs. Hicks and Stevens were sent for; came aboard the vessel; and made an investigation (81, 83). Thereupon they said they thought "that disposed of this matter and we could start in pumping again" (83, 141). Pumping of both products simultaneously was resumed, but successive tests taken at the dock header over a period of 15 minutes failed to show that the color of the *gasoline* was clearing. Accordingly pumping was stopped (84, 118, 119).

Someone then made the suggestion, which "the others thought . . . would be a good plan," that all valves on the boat be shut and one product only be discharged (84).

Accordingly at about 9:30 P. M. on April 23, 1943 they began discharging diesel alone (84). They continued to run the diesel into shore tank 8 until about 6:00 A. M. the following morning, when they changed the run of diesel from shore tank 8 to shore tank 41 (84, 85, 127). The discharge of diesel was completed about 6:10 P. M. on April 24, 1943 (97, 98, 127). They then discharged the remaining gasoline (98).

The switch from shore tank 8 to shore tank 41 at 6:00 A. M. on April 24, 1943 was made because shore tank 8 would not hold all of the diesel from the vessel, and additionally, they wanted some of the diesel in another tank, for with two tanks of diesel appellee's shore plant could supply trucks and boats simultaneously (121, 122).

During the evening of April 23, 1943 samples were taken from the vessel's tanks: samples of diesel from the vessel's tanks 5, 6 and 7 (96), and samples of gasoline from the vessel's tanks 2, 3 and 4 (96). Also that



evening a sample of gasoline was taken from shore tank 62 (129). The following morning about 8 o'clock a sample of diesel was taken from shore tank 8 (129). These samples were then sent to Laucks Laboratories (86). A telephone report thereon was received between 11:00 A. M. and 1:00 P. M. the same day (87). This was followed later by written analyses (Libellant's Exs. 2, 3, 4 and 5).

These reports showed the following with respect to the samples taken:

Diesel in the vessel's tanks 2, 3 and 4: merchantable (96-124).

Gasoline in the vessel's tanks 5, 6 and 7: merchantable (96-124).<sup>22</sup>

Diesel in shore tank 8: contaminated (97-125).

Gasoline in shore tank 62: contaminated (97-125).

In all this, a point of vital importance is overlooked in appellant's argument. *Until appellee after 11:00 A. M. on the morning of April 24, 1943 received by telephone the result of the tests of the several samples, appellant had no knowledge that anything was wrong with any of the diesel which had come from the vessel.*<sup>23</sup> *At that time*

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<sup>22</sup>Despite the result of this test, the *gasoline* subsequently taken from these tanks on the vessel was found to be contaminated in part, for when such gasoline was first run from the vessel it was discolored and did not clear until a part thereof had been discharged. (98, 99, 133, 134.)

<sup>23</sup>The day the vessel arrived bottle samples had been taken from the vessel's tanks (78). These original samples showed a "good product." Discharging from the vessel was held up until these original samples had been taken and checked. It was the gauger's

*they had stopped running the diesel into shore tank 8 and it was being run into shore tank 41 (127).*

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job to see that those samples met his specifications. Then he told the vessel to go ahead and start pumping. (123, 284.)

Mr. Kilbourn, appellee's plant superintendent, testified:

"The Court: . . . Do I understand, then, in the diesel oil tank, that after you started the pumping of diesel oil it came out in good order?

"The Witness: So far as we could tell it was in good order. We had no laboratory. We just used the smell and sight test.

"The Court: But it appeared to be in good order?

"The Witness: Yes. (85).

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"Q. By Mr. Hall: Was there any way of telling whether the diesel oil was contaminated except by smelling it at that time? A. At that time, there was not. (85).

\* \* \* \* \*

"Q. Did you until sometime in the morning of the following day, that is April 24, did you at any time before that believe that the diesel oil was contaminated? A. No. (86).

\* \* \* \* \*

"Q. Now, was the receipt of that telephone advice from Laucks Laboratories the first intimation or first knowledge you had had that the diesel shore tank 8 was contaminated? A. It was.

"Q. I think you said already that none of the samples of diesel taken at the dock headers had indicated by smell any contamination with gasoline. Is that correct? A. That is right. (97).

\* \* \* \* \*

"Q. Now, when was it that you first learned, if you did, that there was something wrong with the diesel? A. Oh, it was the following 24th along. I would say, oh, between 11:00 o'clock and 1:00 o'clock in the afternoon. It was the middle of the afternoon.

"Q. That was when you received a telephone report from Laucks Laboratories? A. Yes.

"Q. You estimate that anywhere from 11:00 o'clock until 1:00 o'clock? A. Around there some time. It was the middle of the day. (120, 121).

\* \* \* \* \*

"The Court: . . . Did you put any more diesel oil in tank 8 after you learned that it was contaminated?

"The Witness: No." (129, 130).

The diesel first run from the vessel into shore tank 8 (at the same time that gasoline was being run from the vessel) on the afternoon of April 23, 1943 was evidently contaminated, for when appellee the next morning received advice from Laucks with respect to the sample taken from shore tank 8 it was to the effect that the contents of that tank was unmerchantable. *But this advice was the first intimation to appellee that there was anything wrong with any of the diesel which had been taken from the vessel.*

The gasoline and the diesel on the vessel were in separate tanks (15, 148). Appellee knew at about 4:00 or 4:30 P. M. on April 23, 1943 that there was something wrong with the gasoline. That was apparent from discoloration. *But there is nothing in the evidence indicating that appellee should have known or suspected until the morning of April 24, 1943 that any of the diesel which had been taken from the vessel was contaminated.* Thus, until the morning of April 24, 1943, appellant did not know or suspect that shore tank 8 contained any contaminated diesel, and cannot be said to have been at fault<sup>24</sup> in permitting diesel to run into shore tank 8 be-

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<sup>24</sup>No similar contention is made with respect to the discharge of gasoline. During the afternoon of April 23, 1943, the gasoline being discharged from the vessel was found to be discolored and pumping was stopped (84, 118, 119). Pumping of the remaining gasoline from the vessel was not resumed until about 8:00 P. M. on April 24, 1943, after appellee had learned the result of the tests made by Laucks (98). When pumping of the gasoline was resumed the gasoline was run into shore tank 62 until the gasoline showed clear, when the flow was diverted into shore tank 61. (98, 99, 133, 134.) Thus, no uncontaminated gasoline from the vessel went into shore tank 62 after the time contamination was discovered in that tank.

tween 9:00 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943.

Further, appellant has failed to offer any proof as to the amount of diesel pumped from 9:30 P. M. on April 23, 1943 until 6:00 A. M. on April 24, 1943, and has offered no proof of any act or omission on the part of appellee with respect to this portion of the cargo. Appellant attempts to create an inference now that appellee was responsible for contamination of this particular diesel because the *gasoline* was discovered to be contaminated. The burden of showing what damages, if any, resulted from this alleged fault on the part of appellee was on appellant (see *Armco International Corporation v. Rederi A/B Disa*, 151 F. (2d) 5 (2 C. C. A. 1945). It is submitted that appellant has failed to sustain this burden of proof.



IV.

**Damages Allowed Properly Included the Award on Account of Attorneys' Fees.**

**(1) The Decree Properly Included an Award on Account of Libelant's Attorneys' Fees.**

The District Court found that the sum of \$8,000 was reasonably incurred by appellee as attorneys' fees on account of the services of its attorneys reasonably employed in this suit (48), and this sum was awarded to appellee as a part of its damages (53).

These fees were not allowed as costs, but were allowed under an express provision of the contract between the parties *as a part of the damages* to which appellee was entitled.

The charter party provided:

"34. Breach.—Damages for breach of this Charter shall include all provable damages, and all costs of suit *and attorney fees incurred in any action hereunder.*" (Brief, Appendix 18.)

Where a contract by its terms provides that damages for its breach shall include attorneys' fees, allowance on account of such fees will be included in the judgment.

*Brown v. Schroeder*, 88 Cal. App. 192, 210, 263 Pac. 325 (1927) (partnership agreement);

*Bank of America v. Lane M. Co.*, 18 Cal. App. (2d) 431, 443, 63 P. (2d) 1189 (1937) (promissory note);

*Campbell v. Birch*, 19 Cal. (2d) 778, 794, 122 P. (2d) 902 (1942) (lease).

Appellant does not question the power or authority of the War Shipping Administration to contract on behalf of the United States in paragraph 34 of the charter for attorneys' fees as an item of damages for a breach of the charter.<sup>25</sup>

Appellant contends that the Suits in Admiralty Act (46 U. S. C. A., secs. 741-752) enables private parties to do something that they could not do before its enactment, *i. e.*, sue the United States; that such Act should therefore be strictly construed; that such strict construction leads to the conclusion that the Act, since it makes no reference to attorneys' fees, while making provision for costs and interest at four per cent per annum "or at any higher rate which shall be stipulated in any contract upon which such decree shall be based," inferentially bars a recovery of attorneys' fees in suits under the Act. Counsel frankly admit that they have been unable to find authority supporting this contention.

There is nothing in the Suits in Admiralty Act indicating that a litigant under the Act is not entitled to recover damages to which he would clearly be entitled in a suit against a private individual. On the contrary sec. 3 of the Act (46 U. S. C. A., sec. 743) provides that:

"Such suits shall proceed and shall be heard and determined *according to the principles of law and to the rules of practice obtaining in like cases between private parties . . .*"

Here is express authority for giving to the attorneys' fee provision in this charter party the same effect that

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<sup>25</sup>Error on this account was originally assigned by par. 15 of Appellant's Assignment of Errors (62), but appellant now states (Brief 9) that this point will not be raised or argued on this appeal.

would be given to an attorney's fee provision in a lease, or promissory note, or other contract between private parties. Upon a breach of such lease, or promissory note, or contract the attorneys' fee provision would be the basis for an award of attorneys' fees *as damages*. So here, the same result should follow.

Counsel's intimation (Brief 38, 39) that an award of attorneys' fees was not mentioned until the second day of the trial, and that no *specific* prayer for attorneys' fees was originally included in the prayer of the libel, does not present a valid ground for disallowance of this item of damages.

On the second day of the trial, January 31, 1945, Mr. Hall, the proctor for libelant, called the Court's attention to paragraph 34 of the charter party (291), and inquired whether, in the event a judgment were ordered for libelant, the Court would fix attorneys' fees without proof of the attorneys' services performed (292). After some discussion the proctor for the libelant stated that he would prepare a statement of such services (292). On February 2, 1945, toward the end of the trial, such statement was presented (334), and it was then stipulated by the proctors for both parties that if Mr. Hall, who was a member of the firm which throughout the case had appeared as proctors for libelant, were called as a witness he would testify in accordance with such statement subject to objection "to any evidence relative to attorneys' fees" (334).

On March 5, 1945, prior to the making or entry of the findings and decree, the Court permitted an amendment to the libel to conform to the proof, by adding before the prayer of the libel an allegation stating the substance



of paragraph 34 of the charter party and by adding to the prayer of the libel a specific request for attorneys' fees (42).

This procedure was within the discretion of the District Court, and in accordance with established admiralty practice.<sup>26</sup>

**(2) The Amount Awarded on Account of Libelant's Attorneys' Fees Was Reasonable.**

The statement presented to the District Court during the trial on February 2, 1945, Libelant's Ex. 15 (336, 337), describes generally the services performed prior to the first day of the trial (January 30, 1945).

It was stipulated that, if called as a witness, Mr. Hall would testify that in his opinion a reasonable fee for the services of libelant's proctors was \$9,000 (339).

The District Court personally observed and was in a position to assess the value of the attorneys' services performed during the trial on January 30 and 31, 1945 and February 2, 1945, as well as the details of the attorneys' services prior to the trial. For example, Rule 12 of the Rules of the District Court required libelant to present, prior to the trial date, a pre-trial memorandum. In this case the pre-trial memorandum presented by proctors for libelant comprised fifty-two printed pages. Additionally, three typewritten memoranda of points and authorities

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<sup>26</sup>As said in *Benedict on Admiralty*, 6th ed., Vol. 2, page 101:

"The court is not, however, bound by the amount of damages claimed in the libel. When it appears on investigation that the libel has merit and that justice requires a larger remuneration than the libel has demanded, the court is not precluded by any technical forms from doing full justice."



were presented by proctors for libelant (337, 338), and prior to the trial they had prepared and propounded interrogatories (250). The details of these services and of other services performed, while not fully disclosed by the record on this appeal, were known to the District Court.

As admitted by appellant (Brief 40), the District Court was qualified and competent to determine the value of the attorneys' services without expert testimony as to such value.<sup>27</sup>

The reasonableness of this award on account of attorneys' fees depended upon a variety of factors.<sup>28</sup> Some are

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<sup>27</sup>In *Stanolind Oil & Gas Co. v. Guertzen*, 100 F. (2d) 299, 302 (9 C. C. A. 1938), this Court referred to "the generally accepted rule that a judge is permitted to appraise the legal services of counsel without, or independent of, any testimony on the subject."

As said in *Spencer v. Collins*, 156 Cal. 298, 307; 104 Pac. 320 (1909): "When the court is informed of the extent and nature of such services [attorneys' services], its own experience furnishes it with every element necessary to fix their value."

<sup>28</sup>In *Blackhurst v. Johnson*, 72 F. (2d) 644, 648 (8 C. C. A. 1934), it was said:

"In determining the question of the reasonableness of the attorney fees, many elements are entitled to consideration—the character, ability, and experience of the attorneys, the amount involved, the time necessary to prepare for trial, the difficulties and intricacies of the propositions involved, and the results obtained, as well as other elements."

In *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2 C. C. A. 1924), it was said:

"It is matter of common knowledge that there has been a very great rise in rentals in business sections where attorneys ordinarily must have their offices, as well as a substantial advance in the compensation accorded to their employes, and, when an allowance is to be made, the court must give these facts consideration. Laymen rarely fail to figure a transaction on the basis of net profit, but, curiously, the compensation of attorneys is frequently discussed and thought of as if the attorney was the beneficiary of the whole amount awarded, without remembering that he, like the business

disclosed by the record before this Court. All must necessarily have been known to and considered by the trial judge. The latter had before him all papers filed in the cause, and was familiar with all that had occurred in Court both before and during the trial. No attempt was made by appellant to contradict or question either the showing made as to the services performed, or the opinion as to their value.<sup>29</sup> It is submitted that there is no reason or basis for disapproving the finding of the District Court that \$8,000 was reasonable.

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man, must first pay expenses before he can determine what he has really earned for the support of himself and those dependent upon him.

This case required a very great amount of preparation, the trial was protracted, and plaintiffs had the services of a firm of three attorneys. These attorneys tried the case with marked ability. They were opposed, not only by the able and skillful lawyers who represented the defendants at the trial, but also, in certain phases, by other counsel of high distinction. In determining what is a reasonable fee, many elements must be considered, and some of these are the character of the services rendered, the manner in which rendered, the time occupied, and the result attained. Not the least important element is the responsibility which rests upon counsel. It was not easy in this case to determine the theory upon which it should be tried. That determination demanded the courage of selection. If the action had been planned and tried upon a wrong theory, it would have failed, and thus it is that ability should be recognized as an attribute not to be measured by a yardstick."

<sup>29</sup>In *City of Wewoka, Okl. v. Banker*, 117 F. (2d) 839, 844 (10 C. C. A. 1941), it was said:

"Generally, an allowance of a fee to a solicitor, in this class of cases, is within the judicial discretion of the trial court and in fixing that fee the court can proceed upon its own knowledge of the value of the solicitor's services, and *the trial court's conclusion, based on the facts and his own knowledge must be accepted unless the evidence decidedly preponderates against it.*"

### Conclusion.

The result of appellant's argument is that a tanker operator who undertakes delivery of two products may negligently and carelessly commingle them and render them (and other products on shore) worthless, without accountability. It is respectfully submitted that there is nothing in this case which permits such a far-reaching and unconscionable result. The decree of the District Court should accordingly be affirmed.

March 26, 1946.

PILLSBURY, MADISON & SUTRO,  
LAWLER, FELIX & HALL,  
FELIX T. SMITH,  
JOHN A. SUTRO,  
JOHN M. HALL,

*Proctors for Appellee.*





No. 11126

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

*Appellee.*

---

## APPELLANT'S REPLY BRIEF.

---

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*Appellee.*

---

## APPELLANT'S REPLY BRIEF.

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In replying to appellee's brief appellant will only deal with such features as seem to require comment, believing that appellant's theory and argument of the case were fully expounded in its opening brief.

### I.

Private Carriage Was Involved and the Contract Between the Parties Affords a Full Defense to Appellant.

The complete answer to points I and II of appellee's brief, viz.,

- I. The Carriage of Goods by Sea Act Governed the Rights and Duties of the Parties, and Appellant Was Liable for a Breach of Such Duties (pp. 4-14).

- II. Even if the Carriage of Goods by Sea Act Had Not Been Made a Part of the Contract of the Parties, Appellant, Was Nevertheless Liable for a Breach of Its Duties as Bailee for Hire Despite Paragraph 19 of the Charter Party (pp. 15-23).

is that the carriage was *private* and the parties were free to contract as they chose; the contract was the charter party, Form 104, which never incorporated the Carriage of Goods by Sea Act and consequently the Act does not apply to the shipment in question. The argument on this score is found at pages 10-22 of appellant's brief and does not require repeating at length here.

The situation is then one of appellant being a bailee of goods for hire *under a written contract, i. e. the charter party made between the parties, which contract governed their respective rights and liabilities*. There is a vast difference between a simple bailment for hire, and a bailment for hire pursuant to a written contract, for the reason that it has been the law for some hundreds of years that the parties to a bailment for hire may contract as they choose about their respective rights and liabilities. Thus, parties to a private contract of carriage may agree that the carrier shall be exempt from liability for its own negligence. Authorities such as *The Fri*, 154 Fed. 333 (2 C. C. A. 1907), cited in appellant's brief (pp. 15, 16) and certain of the authorities cited by appellee like *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, 86 L. Ed. 89 (1941) clearly enunciate the rule. In the latter case the Supreme Court of the United States said at page 110 of 314 U. S.:

"Petitioner apparently does not challenge the distinction which for more than two centuries since

Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint 107, *supra*, has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a private bailment of merchandise on a barge in New York Harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach."

It follows that there is no liability upon appellant if the terms of the charter party afford a defense to appellant. Paragraph 19 affords such defense.

Before discussing paragraph 19 further it is interesting to note that a late decision, *Romano, et al. v. West India Fruit & Steamship Co., Inc.*, 151 F. (2d) 727 (5 C. C. A., decided November 14, 1945), is a very recent authority on the proposition that where a private contract of carriage is involved the bill of lading is merely a receipt and not a contract. The Court said at page 730:

"The owner's reliance on Par. 12 of the bill of lading, declaring that the carrier shall not be charged with deviation under conditions there set out, will not at all do. In the first place, where a bill of lading is issued by the master to a charterer who has contracted for the full capacity of the ship, the bill of lading is merely a receipt and not a contract, and its provisions cannot affect or modify the liability of the ship."



Paragraph 19 (quoted verbatim at page 23 of appellant's brief and at pages 10-11 of the appendix) states that the vessel "shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo." (Emphasis ours.) Let us examine the plain meaning of these plain words somewhat more closely. The principal and perhaps the only "consequence arising out of shipping more than one grade of cargo" coming to mind is that of *contamination*. The very thought or nature of contamination of mixing the products implies in itself negligence or carelessness on the vessel somewhere along the line. Somebody on the vessel mistakenly turns or opens the wrong valve and lo!—there is a mess! Commercially speaking, gasoline and diesel oil do not mix nor do any other high gravity and low gravity petroleum products.

Appellant wanted to protect itself in the event of any negligence or conduct on the part of its employees or the vessel resulting in contamination of different grades of cargo and that is the reason such provision was made in paragraph 19. If but one grade of cargo be carried it can be run from one tank to another and from one pipeline to another with impunity; but when more than one grade of cargo be carried the burden on the carrier is very much greater, having in mind the complicated system of valves and piping on a Swan Island tanker such as the Egg Harbor. One turn of the wrong valve can mean a catastrophe.

There is no conflict between the plain meaning and intent of paragraph 19 and other provisions of the charter party as suggested by appellee in its brief at pages 22 and 23. Paragraph 19 simply relieves appellant from liability in a particular situation apt to occur on a tanker where more than one grade of cargo is carried, *i. e.* contamination. Nor does it follow as contended at page 18 of appellee's brief that the single fact that more than one



product is carried would in every case relieve the carrier from liability or damage to either product no matter how such damage occurred. The charge in this case throughout has been negligence and lack of due diligence. There is no charge or contention that appellant *wantonly or wilfully* contaminated the two grades of cargo.

## II.

### **Damages Are Limited to Contamination Only on the S. S. Egg Harbor, if Appellee Is Entitled to Recover.**

Appellee claims that it is entitled to damages for contamination on both ship and shore and cites a number of cases which may be referred to as "fraudulent sale" cases. One of the principal cases cited is *Dushane v. Benedict*, 120 U. S. 630, 30 L. Ed. 810 (1887). A rag dealer sold a quantity of rags to a paper maker and falsely represented that they were clean and free from infection. When the rag dealer sued to recover the purchase price, a defense was set up for damages for breach of plaintiff's agreement to sell the rags free from infection. It further appears from the context of the case that the rag dealer knew that the rags were to be applied to a particular purpose, *i. e.* making paper. The Court said at page 637 of 120 U. S.:

"The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. French

v. Vining, 102 Mass. 132; *Wilson v. Dunville*, 4 L. R. Ir. 249, and 6 L. R. Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation (*Mullett v. Mason*, L. R. 1 C. P. 559; *Jeffrey v. Bigelow*, 13 Wend. 518; *Faris v. Lewis*, 2 B. Mon. 375; *Sherrod v. Langdon*, 21 Iowa, 518; *Marsh v. Webber*, 16 Minn. 418); or in an action on the warranty, either in tort (*Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. D. 92), or even in contract (*Black v. Elliott*, 1 Fost. & Fin. 595. See also *Randall v. Newson*, 2 W. B. D. 102)."

Of similar import are the animal cases like *Marsh v. Webber*, 16 Minn. 375 (1871) and *Jeffrey v. Bigelow*, 13 Wend. 518 (1835) cited in the quotation above from *Dushane v. Benedict*. These cases are distinguishable from the case at bar in that a fraudulent sale was involved and the context of the decisions shows that the seller sold with knowledge of the purpose for which the goods were to be used.

The case of *Davis v. Clement Grain Co.*, 251 S. W. 545 (Tex. Civ. App. 1923) involved a claim for damage to some hay in a box car. Part of the hay was ruined by water coming in through a leaky roof and the rest of the hay in the car was damaged. This case presents a picture where damage occurred to the hay on a partial total basis and a partial basis while all in the control of the carrier and is thus distinguishable from the case at bar.

Appellee also cites the recent case of *Armco International Corp. v. Rederi A/B Disa*, 151 F. (2d) 5 (2 C. C.

A. 1945). A careful reading of that case, it is respectfully submitted, will show that in discussing damages it went off on the question of burden of proof. Iron plates were discharged from the vessel at Buenos Aires, loaded onto railroad cars, and the railroad carried them a short distance to a warehouse where they were stacked. The Court said at page 9:

“Since there is nothing to charge the consignee until the plates were stacked in the warehouse, and since some part at least of the damage to the plates from holds numbers one and two probably occurred during that time, the ship failed to prove *how much* of the damage was caused by any negligence chargeable to the consignee. That alone is enough to charge her all the damage.” (Emphasis ours.)

In the case at bar it is very definite what damage occurred on shore and what occurred on the ship. There is no area of uncertainty as in the *Armco* case, which uncertainty put the loss on the ship because it could not prove otherwise.

Paragraph 7 of the charter party provided in part as follows:

“7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, *and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.*” (Emphasis ours.)

Appellant contends that *as a matter of contract* between the parties, liability for any damage terminated once the cargo went over the side; paragraph 7 was intended to



limit damages in the event liability were established to the cargo on board the ship. The reason is clear—the vessel had no control over anything that transpired once the cargo went over its side and it is respectfully submitted that a reasonable construction of paragraph 7 *as the contract between the parties* impels the conclusion that damages are to be limited to those occurring on board ship in the event liability be established.

Appellant was neither overstating anything nor being ethereal nor figurative in its reference to and example of the "dire consequences" of charging appellant for damages to contents already in the shore tanks if liability be established. *We have such a dire consequence right in this case.* 8140 barrels of gasoline were contaminated on the Egg Harbor. 11,339 barrels of uncontaminated gasoline were stated by appellee to be in shore tank 62. Appellee wants damages for both, *the contents of shore tank 62 being 139 per cent more than the contaminated 8140 barrels on the vessel.* It might just as well have been 200 per cent more, 300 per cent more, or 500 per cent more—it is simply a matter of degree. It could even be far worse with diesel oil which, according to Mr. Kilbourn, is far more easily contaminated than gasoline.

Appellee says that appellant ". . . had every reason to foresee the possibility that upon arrival, such products would be discharged into shore tanks which already contained like products" (p. 26). What's fair for one is fair for two, and accordingly, appellee had every reason to foresee the possibility that there might be some contamination on board the vessel. *In addition, however, as far as appellee is concerned,* it was the one who had the sole control over the products once they left the ships' side and it was the only one *who knew where they were going and who could do with them as it pleased.* Appellant respect-



fully submits that if both appellant and appellee are chargeable with foreseeing the possibilities above mentioned, appellee additionally having the sole control over the handling of the products once they left the ship's side, the loss and any damage to the contents of shore tanks should fall on appellee.

### Conclusion.

The parties were free to contract as they wished. They contracted for the carriage of more than one grade of cargo. The grades became mixed somehow but in all events through no wilful or wanton act of appellant. The resulting situation was clearly a "consequence arising out of shipping more than one grade of cargo" for which appellant was not responsible under paragraph 19 of the contract.

The decree should be reversed.

Respectfully submitted,

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No. 11,126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellant,*

vs.

STANDARD OIL COMPANY OF CALIFORNIA

(a corporation),

*Appellee.*

APPELLEE'S SUPPLEMENTAL MEMORANDUM  
ON JURISDICTION.

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IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,

*Appellant,*

vs.

STANDARD OIL COMPANY OF CALIFORNIA  
(a corporation),

*Appellee.*

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## APPELLEE'S SUPPLEMENTAL MEMORANDUM ON JURISDICTION.

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### INTRODUCTORY STATEMENT.

This Court requested a memorandum of authorities with respect to its admiralty jurisdiction of the damage to appellee's products in the shore tanks. Appellant has submitted a memorandum in which it attempts to split appellee's case into two causes of action, one in contract and one in tort.

Appellant is clearly in error in stating that appellee's case is comprised of two causes of action. The libel, as amended, (3-6, 22-23, 42)\* sets forth but one cause of action for a breach of the contract of carriage and, as a

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\*Numbers in parenthesis, unless otherwise noted, refer to pages of the Apostles on Appeal.

result of that breach, alleges that (a) appellee's cargo on the ship was contaminated and (b) the contents of appellee's shore tanks were contaminated. The cause of action relied upon by appellee to establish appellant's liability arose *on the ship*, and all the damages sought are those which resulted from this breach of contract, and which, from the circumstances, were within the reasonable contemplation of the parties.

In this case appellee could maintain its action either for breach of the contract of carriage or for appellant's tortious act in negligently commingling the cargo on discharge and negligently failing to furnish a seaworthy ship. Appellee chose to proceed on breach of the contract of carriage. However, as we will point out, regardless of the form of action, the damages suffered by appellee would include those resulting from the contamination of the products in the shore tanks, and such damages would be within the admiralty jurisdiction of this Court.

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## I.

**THE PRESENT SUIT IS BASED ON A CONTRACT OF CARRIAGE WITHIN ADMIRALTY JURISDICTION, AND THIS COURT HAS JURISDICTION TO AWARD ALL PROVABLE DAMAGES RESULTING FROM A BREACH OF THAT CONTRACT; AND THE LOCALITY WHERE THE DAMAGE OCCURRED IS IMMATERIAL.**

Paragraph 7 of the libel (4, 5) sets forth that appellee entered into an agreement with appellant under which appellant agreed to carry the cargo separately and in good order and condition and unload it at the destination; and paragraph 9, as amended (22, 23), alleges that appellant



“not regarding their duty in that respect *nor the promise and undertaking aforesaid*,” did not convey or deliver the cargo in good order and condition, “but on the contrary failed to exercise due diligence to make said vessel seaworthy, \* \* \* and failed to properly or carefully load, handle, stow, carry, care for or discharge said cargo,” as a result of which the cargo became contaminated and when delivered a portion thereof was discharged into a tank containing uncontaminated diesel furnace oil, thereby contaminating this oil, and a portion thereof was discharged into a tank containing uncontaminated gasoline, thereby contaminating this gasoline. The further allegations are that from the circumstances appellant could reasonably have understood that the cargo would be received in shore tanks already partly full and that by reason of the contamination of the cargo and the products in the tanks, appellee suffered damage.

It is clear that the action is based on breach of the contract of carriage and not on a tort. There is no allegation of negligence in the libel, as amended. (See *Pillsbury Flour Mills Co. v. Interlake S.S. Co.* (W.D., N.Y.), 36 F. (2d) 390, 391.) It is axiomatic that actions on contracts of carriage, whether under charter party, bill of lading, or both, are within the admiralty jurisdiction of this Court.

*Morewood et al. v. Enequist*, 64 U.S. (23 How.) 491;

*Matson Navigation Co. v. U.S.*, 284 U.S. 352, 358;

*Armour & Co. v. Ft. Morgan S.S. Co.*, 270 U.S. 253, 259;

Benedict on Admiralty, 6th Ed., Vol. I, p. 282.

Any allegations, evidence or arguments which may have sounded in tort in this case were merely descriptive of the

manner in which appellant failed to perform its contract and did not change the suit into a tort action.

*Pacific Coast S.S. Co. v. Bancroft-Whitney Co.* (9th C.C.A.), 94 Fed. 180, 194 (reversed on other grounds, 180 U.S. 49) ;

*Dittmar v. Frederick Starr Contracting Co.* (2d C.C.A.), 249 Fed. 437, 439.

From the record it is apparent that the case was tried and judgment rendered on the basis of a breach of the contract of carriage, and that the damages assessed were those which resulted from the breach and which, from the circumstances and the experience of the parties at the time the contract was entered into, were within the reasonable contemplation of the parties. (See opinion of the District Court, 35-37.) In this regard the District Court, after referring to a clause of the charter party providing that damages for breach thereof shall include all provable damages, states (37) :

“Thus, the damage to the oil in the storage tank *being provable as a breach of the undertaking* of the carrier, paragraph 7 should not be so construed as to limit recovery as provided in said paragraph 34” (emphasis ours).

Since the action for breach of this contract of carriage is clearly within the admiralty jurisdiction of this Court, it follows that this Court is empowered to dispose of all matters arising out of the contract and all damages suffered. This Court, in the case of *Union Fish Co. v. Erickson* (9th C.C.A.), 235 Fed. 385 (affirmed 248 U.S. 308), quoted the following apt language in its opinion (p. 386) :

“In *Church v. Shelton*, 2 Curt. 271, 274, Fed. Cas. No. 2,714, Judge Curtis said that, the contract being maritime, the admiralty—

‘will proceed to inquire into all its breaches, and *all the damages suffered thereby*, however peculiar they may be, and whatever issues they may involve’” (emphasis ours).

And as was said by the court in *Rice v. Charles Dreifus Co.* (2d C.C.A.), 96 F. (2d) 80, jurisdiction in admiralty depends (p. 83) “\* \* \* upon the cause of suit which libellant brings before the court; if that be once maritime, the court may dispose of it completely without the need of any other suit in the same, or any other court; \* \* \*”

What appellee seeks to recover is damages for breach of a contract of carriage. This Court, in assessing damages, will apply the rule of *Hadley v. Baxendale* (1854), 23 L.J., Ex. 179, and include all the loss suffered which was properly provable as a result of this breach of a maritime contract.<sup>1</sup> Whether some of this damage occurred ashore is immaterial so far as the jurisdiction of the court is concerned. Admiralty courts constantly award damages which occur on shore for the breach of a maritime obligation.<sup>2</sup>

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<sup>1</sup>Authorities that such damage was within the reasonable contemplation of the parties are set forth in Appellee's Brief, pages 25-33.

<sup>2</sup>Some examples are:

(1) Maintenance and cure, a maritime obligation, covers injuries incurred ashore.

*Agular v. Standard Oil Co.*, 318 U.S. 724;

*The Betsy Ross* (9th C.C.A.), 145 F. (2d) 688.

(2) Repairs to a ship while in dry dock or upon land are within admiralty jurisdiction because the contract for such repairs is a maritime obligation.

*North Pac. S.S. Co. v. Hall Bros. Co.*, 249 U.S. 119.



The court in the case of *Armco International Corporation v. Rederi A/B Disa* (2d C.C.A.), 151 F. (2d) 5, cited in Appellee's Brief, pages 27-28, assessed damages to the iron plates which were injured after being discharged from the vessel on the ground that the damages occurring ashore resulted from a maritime transaction. The court states (p. 8) that "the damage which did happen ashore was the direct result of the negligence of the ship while the plates were on board." In other words, the negligent breach of the maritime contract was the direct cause of the damage suffered after the iron plates were discharged and on shore.

Appellant's contention that its liability ended at the ship's rail has already been rejected by the district court

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(3) Damages for failure to carry goods such as expenses of holding goods on shore have been allowed.

*Rotterdamsche Lloyd v. Goshö Co.* (9th C.C.A.), 298 Fed. 443, certiorari denied 266 U.S. 621.

(4) For purposes of admiralty jurisdiction the carriage of goods includes the discharge even though that may include acts performed ashore.

*The Milwaukee Bridge* (S.D., N.Y.), 291 Fed. 711.

(5) This may include storage at the end of the carriage.

*Evans v. New York & P.S.S. Co.* (S.D., N.Y.), 145 Fed. 841.

(6) And storage ashore made necessary as a result of cargo contamination is a proper item of damage.

*Philippine Refining Corporation v. United States* (E.D., N.Y.), 33 F. (2d) 974; affirmed 41 F. (2d) 1010.

(7) Even though an action for damage to a dock could not be maintained in admiralty, where the dock owner brought suit at law against a towing company operating the vessel at the time, the admiralty court took jurisdiction to a separate suit by the towing company against the vessel based on the towing contract under which the vessel indemnified the tug owner from such claims.

*Moran Towing & Transportation Co. v. United States* (S.D., N.Y.), 56 F. Supp. 104.

To the same effect:

*Moran Towing & T. Co. v. Navigazione Libera Triestina, S.A.* (2d C.C.A.), 92 F. (2d) 37.



in this case (see *supra*, p. 4) and by the court in *Armco International Corporation v. Rederi A/B Disa*, *supra*, which states (p. 8): "We know of no authority that liability for the consequences of such negligence ends when the cargo goes over the rail, and such a doctrine would be absurd to the last degree." True, the delivery of the cargo was complete at this point. However, prior to the delivery, while the cargo was still at the risk and responsibility of appellant, it had been contaminated. The cause of action had arisen before delivery, some damage had occurred, and discharge over the ship's rail did not exonerate appellant from the further consequences proximately resulting from its breach of contract.

We submit that the contamination of appellee's products in the shore tanks was a proximate result of the breach by appellant of the maritime contract of carriage, that the damages suffered thereby were within the reasonable contemplation of the parties, and that the entire matter of damages is within the admiralty jurisdiction of this Court.

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## II.

### **EVEN IN TORT ACTIONS, ADMIRALTY WILL AWARD DAMAGES OCCURRING ON LAND WHICH ARE A PROXIMATE RESULT OF THE MARITIME TORT.**

Even had this action been brought in tort, the admiralty court would have had jurisdiction of the damage occurring to the products in the shore tanks. The jurisdiction would result because the court would merely be assessing damages proximately resulting from a maritime tort, and the

fact that a portion of the damages suffered occurred on land would not oust jurisdiction. The tort was complete when the two products carried were mingled on the vessel; it was a maritime tort, and the court sitting in admiralty would have jurisdiction, not only of the damage occurring on the vessel, but also of all damage proximately resulting from the tort, wherever such damage may have occurred.

In *The Admiral Peoples*, 295 U.S. 649, a passenger was injured when he fell to the dock from a defectively rigged gangplank. The court held that the gangplank was part of the vessel so that the locality was maritime and the cause of action arose from a breach of duty owing him while still on the ship; hence admiralty had jurisdiction. The fact that the ultimate injury occurred on the dock, i.e., land, was held to be immaterial, the Supreme Court citing the following language from *The Strabo* (2d C.C.A.), 98 Fed. 998, 1000:

“The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water.”

Likewise, in *Minnie v. Port Huron Co.*, 295 U.S. 647, the Supreme Court held that the claim of a longshoreman, swept from the deck of a vessel upon a wharf where he was hurt, came within the admiralty jurisdiction, stating that it was the blow received on the vessel in navigable water which gave rise to the cause of action and the maritime character of the cause of action was not altered by the fact that the man suffered the injury on land.

See also

*The Shangho* (9th C.C.A.), 88 F. (2d) 42; certiorari denied 301 U.S. 705.

In the case before this Court the same rule would apply. The contamination of the cargo on the vessel in navigable waters gave rise to a cause of action for a maritime tort. The maritime character of the cause of action being complete, it is not of importance to admiralty jurisdiction that a part of the damage suffered and proximately resulting from the maritime tort occurred on land.

The numerous cases where, although the negligent act occurred on navigable waters, the cause of action of the complaining party did not arise until damage occurred on land are not in point. *The Plymouth*, 70 U.S. 20, cited by appellant, is such a case. It was not until the fire reached the dock that the libelant's cause of action in that case arose, and therefore the tort was nonmaritime in locality. Contrast that case with *The Admiral Peoples*, supra, where the libelant's cause of action was complete on the gang-plank, and the consequential damages occurred on the dock and the distinction becomes plain between a maritime tort with consequential damages occurring ashore and a non-maritime tort which arose on shore.

## III.

THE QUESTION OF THE AMOUNT OF DAMAGES AWARDED IN  
THIS CASE SHOULD NOT AFFECT THE AMOUNT OF ATTOR-  
NEY'S FEES AWARDED.

The question of the reasonableness of the attorney's fees awarded by the district court in this case has already been argued in the briefs heretofore filed with this Court. Assuming as we must that the district court in awarding the sum did so on the basis of what were the reasonable value of the services rendered in the case, it is difficult to see the relevancy of appellee's argument that the amount of fees should be reduced if the judgment is reduced. Certainly the reasonable value of these services has not been diminished in any way, and if the award is a proper item of damage under the charter party, the amount thereof does not depend on whether the damages recovered in the action are reduced upon appeal for some reason.

Dated, June 5, 1946.

LAWLER, FELIX & HALL,

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